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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-493

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; EDWARD J. CARLOUGH; and DAVID TODD,
Petitioners,

v.

ANTHONY G. PIGNOTTI, as an individual member of Local #3 Sheet Metal Workers' International Association,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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OCTOBER TERM, 1973

No.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; EDWARD J. CARLOUGH; and DAVID TODD, *Petitioners,*

v.

ANTHONY G. PIGNOTTI, as an individual member of Local #3 Sheet Metal Workers' International Association, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the State of Nebraska (App.[1] pp. 3a-18a) is re-

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[1] Refers to the separately printed and bound Appendix.

ported at 343 F. Supp. 236. The opinion of the Court of Appeals (App. pp. 19a-37a) is reported at 477 F. 2d 825.

JURISDICTION

The judgment of the Court of Appeals (App. p. 38a) was entered on April 20, 1973. On July 2, 1973, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including September 17, 1973. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a union member can bring a suit under Section 501(b) of the Labor-Management Reporting and Disclosure Act against union officials who have not mishandled or mismanaged any funds or property of the union or used their union offices to derive a profit therefrom?

2. Whether a union member can bring suit under Section 501(b) of the Labor-Management Reporting and Disclosure Act to recover damages or injunctive relief for himself and certain other union members rather than on behalf of the local union as a labor organization?

3. Whether either Section 101(a)(1) or 501(a) of the Labor-Management Reporting and Disclosure Act requires the trustee of a local union validly placed under a trusteeship to adopt the position on a collective bargaining issue favored by the membership in a secret ballot vote at a special meeting held prior to the imposition of the trusteeship?

4. Whether a union member can bring suit under Sections 102 or 501(b) of the Labor-Management Re-

porting and Disclosure Act to obtain relief against local and International union officials in respect to actions undertaken by them in the capacity of statutory collective bargaining representatives?

5. Whether, in a suit brought under Sections 102 and 501(b) of the Labor-Management Reporting and Disclosure Act, a federal court, in evaluating the validity of the conduct of local and International union officials, may substitute its own interpretations of the union's constitution, rules of parliamentary procedure and written or unwritten customs or practices for those of the responsible union officials?

6. Whether an International union and International union officers violate Section 101(a)(1) or Section 501(a) of the Labor-Management Reporting and Disclosure Act by imposing upon a local union a trusteeship validly established in conformity with the provisions of Sections 302 and 304?

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix A, *infra.*

STATEMENT

Petitioners[2] are an International labor union, its General President, and one of its International Representatives who served as the trustee of the local union. The local union, its president, and its business manager who were defendants in the district court and appellants in the court of appeals have not joined in this petition.

While the facts are somewhat complicated, they deal, in general, with a dispute over the participation

[2] Sheet Metal Workers' International Association, AFL-CIO —, Edward J. Carlough, and David Todd.

by members employed in a particular bargaining unit in a jointly administered employer-union pension plan obtained through collective bargaining.

Local Union No. 3 of the Sheet Metal Workers' International Association, AFL-CIO (Local 3), a "mixed" local union consisting of about 500 skilled journeymen construction workers and 150 production employees, represents both groups of employees as their exclusive collective bargaining representative. It entered into a 3-year collective bargaining agreement with the construction industry contractors on July 26, 1969, which, inter alia, provided that upon thirty (30) day notification from the union, the employers would deduct any designated amount of money from the wages of their employees and pay the same to "the sheet Metal Workers' Pension Fund". (Pl. Ex. 3, p. 9, App. B[3], *infra*, p. 8)

One of the pension plans under consideration by the local union was the Sheet Metal Workers' National Pension Fund, Plan A (the National Plan), a joint employer-union pension trust, fully qualified under Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186. The National Plan was sponsored, in part, by Sheet Metal Workers' International Association, AFL-CIO (International) and recommended by the latter to its affiliated local unions throughout the nation. The International sent representatives to Omaha to appear before the union's pension committee and the membership to attempt to persuade Local 3 to select the National Plan rather than some other plan offered by another institution.

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[3] A selected group of exhibits introduced by the parties at the trial in the district court have been printed in Exhibit B, *infra*, pp. 7-23.

A special meeting of Local 3 on March 25, 1971, was called "to vote for or against a pension plan," (App. 21a) at which a motion to adopt the National Plan was defeated by a standing vote of 93 to 66.

The membership, at the regular meeting on April 1, 1971, decided to have a "special order of business" at their next regular meeting (on May 6) "to determine whether or not Local 3 wants a pension plan." Prior to that date, on April 20, 1971, a properly executed petition calling for a special meeting[4] to take a vote by secret ballot on the specific question whether "to commence contributing 20¢ per hour to the [National Plan] on June 2, 1971" was presented to Local 3 President Walter Brader. Brader did not act on the petition at that time because of the pending special order of business which was scheduled for the May 6 regular membership meeting.

During the special order of business at the May 6th meeting, the members by secret ballot voted on the question whether to have any pension plan. There were 58 "no" votes to 43 "yes" votes. After the negative vote on that motion, another motion was made "to postpone, indefinitely, the pension plan and reference thereto (Rule 23)".[5] When the Chair an-

[4] The International Constitution provides in Article Ten (10) Section 6(a): ". . . . Special meetings *shall* be called by the local union president upon the recommendation of the local Executive Board or upon the request of at least ten (10) members in good standing or ten percent (10%) of the members in good standing, whichever is the greater." (Emphasis ours.) (Pl. Ex. 1, p. 44, B, *infra*, p. 7).

[5] Rule 23 of the Ritual of the International provides: "When a question is postponed indefinitely, it shall not come up again except by a two-third (2/3) vote". (Pl. Ex. 1, p. 129, App. B, *infra*, p. 7).

nounced the motion lost by a count (of a show of hands) of 29 to 24, its ruling was challenged. A recount by a division of the house, a procedure under which *all* members in attendance are *required* to vote by standing on one side of the room or the other, was demanded and obtained. The division of the house resulted in the motion to postpone indefinitely being carried by a vote of 60 to 30. (App. 22a)

President Brader wrote to Edward J. Carlough, General President of the International, for advice after the May 6th meeting. He asked whether the procedure followed at the May 6th meeting was proper and also whether he should still honor the April 20th petition for a special meeting. Carlough's assistant, Lonnie Gaither, who responded, advised that the motion to postpone indefinitely was out of order and should not have been entertained by the Chair and that the motion for a division of the house on the improper motion to postpone indefinitely was also in error as not being timely made.

President Brader decided to honor the April 25th petition for a special meeting, and scheduled it for May 27th. The special meeting was called to order on that day but ended without a secret ballot being taken because the membership, by a vote of 51 to 50, sustained a motion that the proposed ballot was a motion to reconsider the vote taken at the regular meeting of May 6th and, hence, out of order at the special meeting.

Protests of the adjournment of the special meeting were lodged with General President Carlough. Carlough's assistant, Lonnie Gaither, sent in Eugene Edwards, an International Representative, to inves-

tigate and resolve the dispute. Edwards directed that the special meeting be re-scheduled for June 21, 1971, for the purpose of voting by secret ballot on the specific question which was to have been put to the membership on May 27th.[6] At that special meeting, the membership voted 77 to 71 in favor of "contributing 20¢ per hour into the [National Plan] on August 1, 1973". The Local 3 officials thereafter notified the signatory construction industry contractors to commence contributing 20¢ per hour into the National Plan as of August 1, 1971, and they did so.

A properly executed petition for another special meeting "for the purpose of voting down the pension contributing plan previously passed on June 21, 1971" was submitted to President Brader on July 15, 1971. (App. 24a). When it was not honored as promptly as the pension plan opponents desired, they filed suit in the United States District Court on July 24, 1971, seeking an injunctive order to require that the special meeting be held, and for other relief. Jurisdiction for this suit was based upon Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186. The District Court dismissed the suit on August 31, 1971, for failure to state a claim under Section 302 upon which relief could be granted.

President Brader then voluntarily honored the petition for a special meeting which was held on October 22, 1971. The members at the October 22nd special meeting, in a secret ballot, voted 175 to 119 "not to

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[6] The General President or his authorized representative has authority to call special meetings pursuant to Article Three (3), Section 2(f) of the International Constitution. (Pl. Ex. 1, p. 25, App. B, *infra*, p. 7).

retain our National Plan in Local No. 3". (App. 24a)

The officers of Local 3 shortly after this meeting consulted with their attorney, Mr. David D. Weinberg. He advised that they were under obligation to make every effort to negotiate with the employers to reopen the collective bargaining agreement in order to withdraw from participation in the National Plan. The Local 3 negotiating committee, accordingly, on October 29th and again on November 17th requested a meeting with the collective bargaining representatives of a number of the signatory construction industry contractors, but the contractors' representatives did not meet with them until December 2, 1971. When the meeting finally took place, the contractors' representatives agreed to delete the obligation to participate in the National Plan only if Local 3 would accept three conditions,[7] one of which was an undertaking by the union to hold the employers harmless from any liability to prospective pensioners resulting from the aforesaid mid-term modification of the collective bargaining agreements. (App. 24a-25a).

Mr. Weinberg was again consulted, this time in regard to the conditions imposed by the contractors. He strongly advised, orally and in an opinion letter,[8] against acceptance of those conditions unless they were first approved by a court of competent jurisdiction in a declaratory judgment action. The legal complications over which Mr. Weinberg expressed appre-

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[7] Pl. Ex. 78, App. B, *infra*, p. 8.

[8] Pl. Ex. 84, App. B, *infra*, pp. 9-10. (This letter was sent on January 3, 1972, rather than January 3, 1971, as mistyped).

hension involved questions of third party beneficiary rights and possible violations of fiduciary duties imposed on the local union officers under Section 501(a).

Attorney Weinberg's misgivings were to have been brought up for discussion at the next regular meeting on January 6, 1972, but prior to this date, on January 4, 1972, Local 3 was placed under trusteeship by General President Carlough. A number of internal union problems, none of which pertained to the pension plan controversy, were cited as grounds for taking this action,[9] and it was ratified on March 23, 1972, by the International's General Executive Council after a hearing in Washington, D.C. The court of appeals held that the trusteeship was imposed in conformity with the procedural requirements of Sections 302 and 304 of the Act. (App. 28a).

David Todd, an International Representative, who was appointed as trustee of Local 3, told the membership shortly after he assumed his duties that he intended to continue participation in the National Plan as a fringe benefit in the collective bargaining agreement with the construction industry contractors.

Anthony Pignotti thereafter filed the complaint herein in the District Court, naming as defendants the National Plan Trust Fund and the Contractor's Association, as well as the International, Local 3, Carlough, Todd, Forman and Brader. Jurisdiction was purportedly based on Sections 102 and 501(b) of the Labor-Management Reporting and Disclosure Act. The District Court, after trial, dismissed the National Plan Trust Fund and the Contractors' Association from the suit, but held that the International, Local 3, Carlough,

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[9] Def. Ex. 96, 97, 98 and 99, App. B, *infra*, pp. 13-23.

Todd, Forman and Brader violated Sections 101(a)(1) and 501(a) of the Act.

The finding of Section 101(a)(1) violations were based upon the court's evaluation of action or inaction by union officials in the following respects: (1) General President Carlough's authorization of the election on June 21, 1971, in the aftermath of three prior defeats and *"especially after the motion to postpone indefinitely"*; (2) the delay on the part of Forman and Brader in calling another special meeting which, the Court felt, "was mandated" by the petition of July 15, 1971; (3) the "blatant refusal" of Brader, Forman and Carlough "to implement the vote of October 21, 1971";[10] (4) the imposition of the trusteeship upon Local 3; and (5) Todd's refusal as trustee to implement the membership's vote of October 22, 1971. (App. 13a-14a).

The same alleged violations of Section 101(a)(1) were held to be violations of the fiduciary duties imposed in Section 501(a). The District Court, in order to arrive at this conclusion, defined fiduciary responsibility in an extremely broad manner relying mainly on the authority of *Johnson v. Nelson,* 325 F. 2d 646 (8th Cir. 1963).

The District Court granted injunctive relief requiring immediate elimination of the pension plan as a contractual fringe benefit for those members employed in the construction-industry bargaining unit. In addi-

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[10] The decision of the union officers to follow the advice of local union attorney David Weinberg not to accept the three conditions insisted upon by the contractors unless approval of the same was obtained from a court of competent jurisdiction in a declaratory judgment action, thus, is characterized as "blatant" misconduct violative of Section 101 (a)(1).

tion, it amerced defendants International, Local 3, Brader, Forman, Todd and Carlough with damages to be paid to Respondent and the other members who were employed in the construction-industry bargaining unit, equivalent to *all* of the contributions made by the various construction industry *employers* to the National Plan trustees—a sum in excess of One Hundred Thousand Dollars ($100,000.00)—despite the fact that none of the parties had received any of these contributions or profited personally from the fact that they had been made and notwithstanding that the contributions were being held in trust on behalf of any bargaining-unit employees who qualified for pension benefits under the plan. These injunctive and pecuniary remedies, by consent of the parties and with approval of the District Court, have been stayed during the pendency of the appeals of the case.

The court of appeals affirmed. A major portion of the Court's opinion was devoted to a defense of its prior decision in *Johnson v. Nelson, supra,* in which Section 501(a) had been interpreted as imposing on union officers broad responsibilities far beyond those involving alleged mishandling or mismanagement of union money or property. (App. 30a).

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with decisions of the Second Circuit as to the proper definition of fiduciary responsibility under Section 501(a)

The decision of the Court of Appeals permits Respondent to sue Petitioners under Section 501(b) of the Labor-Management Reporting and Disclosure Act for injunctive relief and monetary damages

even though no union funds or property are involved and no claim is made that any union officials held or acquired any pecuniary interests in the National Plan which conflicted with those of the labor union. It is in direct conflict with decisions of the Second Circuit in *Gurton v. Arons,* 339 F. 2d 371 (2d Cir. 1964), affirming *Guarnaccia v. Kenin,* 234 F. Supp. 429 (S.D. N.Y. 1964); *Coleman v. Railway Clerks,* 340 F. 2d 206 (2d Cir. 1965); *Yanity v. Benware,* 376 F. 2d 197 (2d Cir. 1967); and *Morrissey v. Curran,* — F. 2d —, 83 LRRM 2950 (2d Cir. June 18, 1973). These Second Circuit decisions have been followed by a number of district courts, e.g., *Charles v. American Federation of Musicians,* 241 F. Supp. 595 (S.D. N.Y. 1965); *Richardson v. Tyler,* 309 F. Supp. 1020 (N.D. Ill. 1970); *Aho v. Bintz,* 290 F. Supp. 578 (D. Minn. 1968); cf. *McNamara v. Johnson,* — F. Supp. —, 83 LRRM 2497 (N.D. Ill. June 6, 1973).

The conflict between the Second and Eighth Circuits has caused uncertainty in other circuit courts throughout the nation with respect to this issue. For example, the District of Columbia Circuit is apparently undecided as to whether the view of the Eighth Circuit or the Second Circuit is correct. *Jablonski v. United Mine Workers,* 466 F. 2d 424, 428 (footnote 5) (D.C. Cir. 1972); but see *Cefalo v. Moffett,* 449 F. 2d 1193, 1198 (footnote 15) (D.C. Cir. 1971). The Ninth Circuit is in the same posture of indecision. *Kerr v. Shanks,* 466 F. 2d 1271, 1275 (footnote 2) (9th Cir. 1972). The Third Circuit in *Sabolsky v. Budzanoski,* 457 F. 2d 1245 (3d Cir. 1972), cert. den. — U.S. —, 34 L.Ed 2d 96 (Oct. 10, 1972), by dicta, has adopted the Eighth Circuit's position.

The directness of the conflict between circuits on the issue was plainly recognized by the court of appeals below, and it said:

> "We are invited by the appellants to reconsider our holdings in *Johnson v. Nelson,* 325 F.2d 646 (8th Cir. 1963), concerning the scope of § 501(a) on the basis of contrary decisions in the Second and Ninth Circuits . . . . The Second Circuit in *Gurton v. Arons,* 339 F.2d 371 (2d Cir. 1964) and *Coleman v. Brotherhood of Ry. & Steamship Clerks, Freight Handlers, Express & Station Employees,* 340 F. 2d 206 (2d Cir. 1965) has restricted the scope of § 501 (a) only to situations involving 'money and property' of the union. The Ninth Circuit appears to follow Gurton in Phillips v. Osborne, 403 F. 2d 826 (9th Cir. 1968) . . . .
>
> * * *
>
> "Based on the history outlined above, it appears clear that *Gurton v. Arons,* based as it was on the legislative history of the Kennedy-Ervin Bill which was amended out of existence, was unduly restrictive of the scope of the fiduciary duties of union officials commanded by § 501, and that *Johnson v. Nelson,* basing its decision on the legislative history of the Elliott Bill, was properly decided." (App. pp. 29a-30a, 35a).

The conflict among circuits on this issue should be resolved in order to achieve the desired national uniformity in labor policy. As the question is one of a recurring nature, its resolution is of singular importance.

II. The decision below conflicts with the decision of the Ninth Circuit in Phillips v. Osborne as to the right of a union member to sue under Section 501(b) to recover damages for himself rather than on behalf of the labor union

All of the monetary relief sought and obtained by Respondent in the instant case was for the benefit of himself and certain other union members.

The decision of the court of appeals conflicts squarely with *Phillips v. Osborne*, 403 F. 2d 826 (9th Cir. 1968). In *Phillips*, the plaintiff sued under Section 501(b) to recover and distribute union funds which had been impounded and deposited in an escrow account to place them beyond the control of dissident members who wanted to disaffiliate the local chapter from the international union. The Ninth Circuit held that the suit was not allowable because (1) plaintiff was not a member of the union at the time suit was instituted and (2) in any event the funds plaintiff sought to recover were not to be paid into or inure to the benefit of the local union but, rather, were to be distributed equally among the paid-up members of the local union as of a date certain. The Ninth Circuit said (403 F. 2d at 832):

> "In requesting direct relief for certain union members only and not 'for the benefit of the labor organization,' Phillips disqualified himself from proceeding under Section 501."

This holding is obviously correct in light of the statutory language of Section 501(b) which permits suit "in any district court . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization . . . ."

III. The court of appeals improperly held that Sections 101(a)(1) and 501(a) require a trustee of a local union to act in accordance with the wishes of the membership on policies voted upon prior to imposition of the trusteeship

The court of appeals held that a trustee is bound by and has an obligation under Sections 101(a)(1) and 501(a) to implement the intendment or purpose of a membership vote taken prior to the imposition of the trusteeship. (App. 29a). Thus, trustee David Todd in his prospective collective bargaining negotiations with the building trades contractors was held to be under a statutory duty to delete the National Plan as a contractual fringe benefit.

The holding on this issue, for which there is no precedent, is a sheer fabrication on the part of the courts below in an attempt to obligate trustee David Todd to take specific affirmative action on a collective bargaining issue, on which he has discretion to act in various ways provided only that he must exercise his authority to bring about a result he believes to be in the best interests of the union. The trustee under this erroneous holding would become "subject to the control of the very body he was appointed to supervise and govern", thus negating the very nature of a union trusteeship. *Branch v. Vickers*, 209 F. Supp. 518, 522-523 (E.D. Mich. 1962); *Blassie v. Poole*, not officially reported but cited at 58 LRRM 2359 (E.D. Mo. 1965).

The Court should review this erroneous interpretation and application of Sections 101(a)(1) and 501(a).

IV. The court of appeals improperly held that Sections 101(a)(1) and 501(a) regulate conduct of union officials in their capacity as exclusive collective bargaining representatives

The conduct on the part of the union representatives to which Respondent takes greatest exception and for which he sought pecuniary relief relates to their actions as collective bargaining representatives. The "implementation" of participation in the National Plan, after June 21, 1971, was collective bargaining activity. The unsuccessful attempts to negotiate a contract reopening after October 22, 1972, to delete the pension plan as a fringe benefit were even more directly activities of bargaining representatives.

The National Labor Relations Act imposes extensive obligations on the bargaining representatives of employers and employees in Section 8(d), 29 U.S.C. § 158(d). Refusal to bargain in good faith is made an unfair labor practice for employers, Section 8(a)(5), 29 U.S.C. § 158(a)(5), and for labor organizations acting in the capacity of employee bargaining representatives, Section 8(b)(3), 29 U.S.C. § 158(b)(3).

Inasmuch as labor unions through these provisions of the National Labor Relations Act become exclusive representatives of all employees in the bargaining units regardless of their union affiliation, *NLRB v. J. I. Case Co.*, 321 U.S. 332 (1944); *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944), and acquire great power over their economic destiny, they have been impressed by the courts with a correlative *statutory* duty to represent fairly all members of the bargaining unit regardless of union affiliation, race, color, creed, national origin, or personal bias or hostility on the part of union officers or agents. *Steele v.*

Louisville & N. R. Co., 323 U.S. 192 (1944); *Ford Motor Company v. Huffman*, 345 U.S. 330 (1952); *Vaca v. Sipes*, 386 U.S. 171 (1967). This statutory duty of fair representation may be enforced judicially in suits brought by individual members under Section 301 of the National Labor Relations Act. *Vaca v. Sipes, supra.*

The Labor-Management Reporting and Disclosure Act, on the other hand, was *not* enacted by Congress to regulate collective bargaining activities which are concerned with relations between employees and their employer, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Strauss v. Int. Bro. Teamsters*, 179 F. Supp. 297, 300 (E. D. Pa. 1959); *McAfee v. Auto Workers*, not officially reported but cited at 71 LRRM 2515 (E. D. Mich. 1969), or to provide union members with an additional remedy for alleged arbitrary or improper collective bargaining representation. The court of appeals has erroneously interpreted Sections 101(a)(1) and 501(a), however, and provided Respondent with precisely such a remedy.

The court should rule on this point in the interest of harmonizing the variant labor policies under these two federal Acts.

V. The court of appeals improperly evaluated the validity of union conduct on the basis of its own interpretations of the union constitution, rules of parliamentary procedure, customs and practices rather than those of the responsible union officials

The court of appeals has disagreed with most of the decisions made and actions taken by the responsible union officials in the instant case. However, Petitioners Carlough and Todd and the local union officers, Brader and Forman, are laymen who have been duly

elected to International and local union offices. They exercised judgment in dealing with the various problems that developed. When in doubt, they sought and followed legal advice. The actions of the International and local union officers were always "reasonable" in the sense that they were logically justifiable to them under union principles, customs and practices, even though, as aforesaid, the courts below may have felt that the decisions were improvident or incorrect or otherwise.

The court's conclusion that the union officers acted improperly on the pension issue is bottomed on its own interpretations of the duties of union officials such as the union president and union business manager, which are prescribed in the International Constitution, and its own views, rather than those of the responsible union officials, on the proper interpretation and application of rules and principles of parliamentary procedure at union meetings. Questions such as how many times an issue can be brought up for vote by the membership and the effect in a parliamentary sense of a motion to postpone indefinitely are peculiarly internal union matters which, it is submitted, were dealt with improperly by the courts below.

The decision of the court of appeals is remarkably analogous to that of the Fifth Circuit in *Int. Bro. Boilermakers v. Hardeman,* 420 F. 2d 485 (5th Cir. 1969), although the issue in *Hardeman* was court review of union disciplinary proceedings rather than, as here, judicial evaluation of union conduct with respect to a collective bargaining issue. The Fifth Circuit in *Hardeman* construed the penal provisions of the union's constitution more strictly than did the union's officers. Then, based upon a restrictive construction of

the language, the court found that the union violated the constitution and, hence, denied Hardeman his rights of fair trial under Section 101(a)(5) of the Act.

This court made clear on review, *Int. Bro. Boilermakers v. Hardeman,* 401 U.S. 233 (1971), that the union through its duly constituted officers rather than the court was entitled to interpret the union's rules and regulations, regardless whether the same were contained in the union constitution, by-laws, principles of parliamentary procedure or even in unwritten principles or precedents. The Court should declare here by analogy to *Hardeman* that conduct relating to internal union matters should be sustained unless the same, when viewed and evaluated in accordance with the constitutional interpretations placed upon it by the responsible officers in the union hierarchy, is inimical to the provisions of the Act.

The decision of the court of appeals, which plainly did not apply that standard for review, will, if not corrected, lead to an "in depth intervention into internal union affairs," which Congress never intended. Beaird, Some Aspects of the LMRDA "Bill of Rights," 5 Ga. L. Rev., 661, 662 (1971).

VI. Petitioners did not violate any duties under Sections 101 (a)(1) or 501(a) by imposing a trusteeship in conformity with the requirements of Sections 302 and 304

The court of appeals affirmed the district court's finding that the International's imposition of a trusteeship over Local 3 was a violation of Sections 101(a)(1) and 501(a) because the "real" ground for such action was to prevent Local 3 from withdrawing its construction industry members from participation in the National Plan. (App. 28a-29a). There simply is no

precedent and no logic for this holding. If union members can challenge *the grounds for imposition of the trusteeship* in suits under Sections 102 and 501(b), in which no presumption of validity is applicable, they will obviously be disinclined to resort to the remedy expressly provided by Congress in Section 304(c). In a suit under Section 304(c) challenging the validity of a trusteeship established in compliance with its procedural requirements, the plaintiff is required to show by "clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under Section 302."

It is true that Section 306 of the Act states that the rights and remedies provided in Title III shall be in addition to any and all other rights at law or in equity. However, we submit that Congress never intended that the grounds for establishment of trusteeships imposed in accordance with the procedural requirements of one Title, pursuant to which a presumption of validity is attached, should be made subject to collateral attack in civil suits under other Titles *of the same federal statute* to which that presumption is inapplicable.

The ruling on this point by the court of appeals is not only incorrect but inherently mischievous and vexatious in that it invites a proliferation of lawsuits over trusteeship. Review of the issue is indeed imperative.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD W. FISHER
741 National Bank Building
Toledo, Ohio 43604

DAVID D. WEINBERG
300 Keeline Building
Omaha, Nebraska 68102

Attorneys for Petitioners

Of Counsel:

MULHOLLAND, HICKEY & LYMAN
741 National Bank Building
Toledo, Ohio 43604

WEINBERG AND WEINBERG
300 Keeline Building
Omaha, Nebraska 68102

September 17, 1973.

APPENDIX

APPENDIX "A"

Labor Management Reporting and Disclosure Act
(73 Stat. 522, 29 U.S.C. §§ 411, et seq.)

Sec. 101(a)(1) Equal Rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and by-laws.

* * *

Section 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

* * *

Section 302. Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

Section 304(a) Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this

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• • •

Section 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

• • •

Section 302. Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

Section 304(a) Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this

title (except section 301) the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate.

(b) For the purpose of actions under this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization (1) in the district in which the principal office of such labor organization is located, or (2) in any district in which its duly authorized officers or agents are engaged in conducting the affairs of the trusteeship.

(c) In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under Section 302. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 302. In the latter event the court

may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

• • •

Sec. 306. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies at law or in equity; *Provided,* That upon the filing of a complaint by the Secretary the jurisdiction of the district court over such trusteeship shall be exclusive and the final judgment shall be res judicata.

• • •

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and by-laws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated

the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

• • •

National Labor Relations Act, as amended (49 Stat. 449, 29 U.S.C. §§ 151, et seq.):

Sec. 8(a) It shall be an unfair labor practice for an employer—

• • •

(5) to refuse to bargain collective with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(3) to refuse to bargain collective with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

• • •

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reach if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after

such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

• • •

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

• • •

APPENDIX "B"

Plaintiff's Exhibit 1

International Constitution

Articles Three (3), Section 2(f), p. 25

"Sec. 2(f). Call of special meetings of local unions and councils. Local unions, state, provincial, and district councils shall upon call of the General President or a duly authorized representative of this Association after official notice to the duly authorized officers of said local unions, state, provincial, and district councils, assemble and convene in meeting at such time and place and for such purpose as may be designated in call and official notice issued; and said meeting shall not adjourn without the approval and consent of the General President of the duly authorized representative of this Association calling said meeting."

Article Ten (10), Section 6(a), p. 44

"Sec. 6(a). Each local union shall determine the times and places for the holding of its regular meetings and determine how many of its members shall constitute a quorum. Special meetings shall be called by the local union president upon the recommendation of the local Executive Board or upon the request of at least ten (10) members in good standing or ten percent (10%) of the members in good standing, whichever is the greater. The call for such special meeting shall specify the time, place and purposes thereof, and no subjects other than those specified in the call shall be considered at such meeting."

Ritual, Rule 23, p. 129

"23. When a question is postponed indefinitely, it shall not come up again except by a two-thirds (⅔) vote."

Plaintiff's Exhibit 3

Collective Bargaining Contract, Article VIII, Section 14, p. 9

"Section 14. Pension: The Employers agree that upon a thirty (30) day notice by the Sheet Metal Workers Local # 3 to deduct specific amount on specific dates from the gross hourly wage rate as requested by the Union and pay said amount to the sheet Metal Workers Pension Fund. By the execution of this agreement the Employer also agrees to enter into the appropriate Trust Agreement within the time limit specified above necessary for the administration of such fund and to designate the Employer Trustees under such Agreement hereby waiving all notice thereof and ratifying all actions taken or to be taken by such Trustees within the scope of their authority."

Plaintiff's Exhibit 78

Phone 558-3961

AIR CONDITIONING & SHEET METAL CONTRACTORS ASSOCIATION OF OMAHA-COUNCIL BLUFFS

Bob Hooker, Executive Director

4470 Farnam Street
Omaha, Nebraska 68131

December 2, 1971

To: Local # 3

Subject: Re-opening of Labor Agreement to delete Pension Fund Clause

We will honor a request to re-open our contract only to delete *all* provisions relative to the pension trust if:

1. It is made in writing and in such a manner that it needs no further union ratification to complete the re-opening and execution of all necessary documents.
2. The pension trustees release the contractor's association from all liability for the deletion and the union

agrees to hold the association and it's members harmless from any liability from deletion of the pension trust.

3. In the event agreement is reached to delete the pension provision as requested it will be conditioned that the pension cannot be re-instated during the remainder of this contract.

GEORGE DEAS
George Deas
Chairman, Labor Committee
SMACNA, Omaha and Council Bluffs

Plaintiff's Exhibit 84

DAVID D. WEINBERG
ATTORNEY AT LAW

Telephone 341-2250
300 Keeline Building
Omaha, Nebraska 68102

January 3, 1971

Sheet Metal Workers International Association,
Local No. 3

1821 California Street
Omaha, Nebraska

Attention: Walter Brader, President

In re: Legal status of change of contract from a pension plan to payment to employees covered by plan for wages in cash

Dear Sir:

You and your executive board have requested an opinion from this office as to a change in the presently existing collective bargaining agreement calling for payment into

a pension trust of 20¢ per hour so that said funds may be diverted to employees in cash, instead of into a pension fund.

A review of the facts in this matter indicate that several years ago the union and Air Conditioning & Sheet Metal Contractors Association of Omaha-Council Bluffs entered into a collective bargaining agreement calling for payment of so many cents per hour as determined by the union into a pension fund. Section 14 of Article VIII of the collective bargaining agreement is as follows:

> "Pension: The Employers agreed that upon a thirty (30) day notice by the Sheet Metal Workers Local # 3 to deduct specific amount on specific dates from the gross hourly wage rate as requested by the Union and pay said amount to the Sheet Metal Workers Pension Fund. By the execution of this agreement, the employer also agrees to enter into the appropriate Trust Agreement within the time limit specified above necessary for the administration of such fund and to designate the Employer Trustees under such Agreement hereby waiving all notice thereof and ratifying all actions taken or to be taken by such Trustees within the scope of their authority.

Pursuant to the terms and provisions of the above paragraph of the collective bargaining agreement your local union notified the association that they desired to allocate 20¢ per hour into a pension fund and, in particular, into the Sheet Metal Workers National Pension Plan. This was accomplished by notification and employers responded to this request by payments into the National Pension Plan. In addition to this, member and non-member employers of the association signed and executed Participation Agreements into the Sheet Metal Workers National Pension Plan. These participation agreements constituted an agreement of the individual contractor to pay into said fund and to

abide by the actions of Trustees with regard to said pensions.

Thereafter, the local union decided to attempt to terminate this plan and to place the 20¢ per hour contribution into the pay checks of employees. Contact was made with the association who agreed to re-open the collective bargaining agreement and to delete the pension fund clause upon the following conditions:

1. Such request was made in writing and that no further union ratification to complete the re-opening and execution of all necessary documents was required.
2. The Pension Trustees release the association from all liabilities for the deletion and termination of the fund and to hold the association and its members harmless from any liability because of this action.
3. In the event an agreement is reached with regard to this matter the pension could not be reinstated during the remainder of the contract.

There are certain fundamental legal facts that should be kept in mind by the union with regard to the situation. In the first place, a valid pension plan was negotiated and executed between the parties which immediately gave rise to certain rights of employees covered by the collective bargaining agreement. Dependent upon eligibility for pension established by trustees and the trust instrument, employees represented by this union were legally entitled to a pension in accordance with the provisions of the contract and the Sheet Metal Workers National Pension Plan. A change of these rights of third parties by altering or amending provisions of an existing collective bargaining agreement, raises serious legal risks to both the union and the association and the non-members of the association. It is my opinion that in view of all of the facts, that have been created in this matter, employees who are third party beneficiaries of this act on the part of the association and

the union would have a cause of action against the union and perhaps the association, and any other contractor for that matter, for failure to grant such pension when the same has been negotiated by the parties.

In the employer's conditions relative to a change in the pension plan, the association desires and requests release from any liability for deletion of the pension plan. This could readily mean from a legal standpoint, that in the event the union was held to be in error in this move all liability would be attached to it if there would be a change in the rights of third party beneficiaries under the collective bargaining agreement. Recent cases, decided by the courts, have tended to enforce this legal position and it is impossible to state in this opinion, the exact nature and extent of the union's liability, should some court in the future decide the union had no right to delete a third party right to a pension under the contract.

It is my opinion that the officials of the union who may agree to a deletion in the manner required by the association may violate their fiduciary capacity under the Labor Management Relations Act of 1959 (Landrum Griffen Act). Officials of labor organizations under the above act are requested to act in the fiduciary capacity and for the best interests of the people they represent and any violation thereof may involve a severe penalty individually to officials.

This matter may be accomplished as requested by the local union in its vote to delete the pension plan in the following manner, subject to approval and participation by all parties. A declaratory judgment action may be requested by one of the interested parties in this matter to determine the potential liability, if any exists, of the local union in this matter, provided, that the association, non-members of the association, and the local union and the Sheet Metal Workers National Pension Plan were involved in the proceeding. If a court of competent jurisdiction determined

that the local union had a right to delete the pension plan in agreement with the association and non-association members as well as approval of the trustees of the Sheet Metal Workers National Pension Plan, this matter may be accomplished. A declaratory judgment action cannot ordinarily lie unless a justiciable controversy exists.

It is my opinion that the local union should not engage in voluntary negotiations for deletion of this plan approved by some definitive court ruling as to its right to do so and a judicial determination as to the issues that would be presented in any such action. To do otherwise, in my opinion would place the local union in a very doubtful legal situation that could conceivably result in tremendous legal liability.

Respectfully submitted,

/s/ David D. Weinberg
David D. Weinberg

DDW:sp

Defendant's Exhibit 96

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
David E. Todd
International Organizer
6409 North Central
Kansas City, Missouri 64118

July 9, 1971

Mr .Edward J. Carlough
General President
Sheet Metal Workers' International Association
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Sir and Brother:

I have just completed my investigation of the conditions that exist in Local #3 at Omaha, Nebraska and its jurisdictional area, as per your instructions.

In order to accomplish this assignment, I met with the local union Executive Board, Business Representatives, the Executive Secretary, and officers of the SMACNA chapter. I checked, in every way possible, the statements made by each group, in order to separate fact from fiction, and have the following report which I believe is accurate.

Local #3 has one hundred out of five hundred journeymen out of work at this time, without any chance for relief in the next twelve months within the Omaha free zone, for the simple reason that there is little work going on or coming up in that area. The free zone is a small area 20 road miles in any direction from the center of Omaha.

On the other hand, there is a lot of work going on, and coming up in the out-of-free-zone area, much of which is within an hour or so drive from downtown Omaha. So, if these one hundred people are to work within the next year, it will have to be in this out-state area in Nebraska and Iowa. However, under present contract conditions in the out-of-free-zone area there is no way that our union contractors can get any work because of the travel pay and subsistence that is required along with the Omaha wage rate and conditions required in all area by the contract signed in '69.

I believe that the above statement can easily be proved by the conditions that now exist in that area, for example, the union contractors have only one job in process at this time and it is small. Also, they have only one job coming up in the future and it was not an open-bid job where the nonunion people could get in on it. Local #3 does not have any men working in the out-of-free-zone area, except for the previously-mentioned small job and three working for a KC contractor on a power plant. Since Local #3 has approximately 51 counties in this area, there is no way they could be in worse shape. It's probably needless to mention, but Local #3 does not have one single contractor signed outside the free zone.

The following are examples of out-of-free-zone conditions that have placed Local #3 in a noncompetitive position with other crafts and nonunion contractors in particular:

***Blair, Nebraska*—6 miles from free zone; Cost of travel and subsistence $6.36 per day per man; Driving time 40 min. from downtown Omaha.**

***Grand Island, Nebraska*—117 miles from free zone; Cost of travel and subsistence $2.62 per hr. per man; Driving time 2 hrs. and half from downtown Omaha. Ironworker rate is $6.17½ per hr. & no travel or subsistence for this area. Our rate would be $10.62 per hr.**

***Shenandoah, Iowa*—51 miles from free zone; Cost of travel and subsistence $2.21 per hr. per man; Driving time 90 min. from downtown Omaha.**

The nonunion people and the steelworkers are having a field day doing all the present work and getting the future work, and will continue to do so until some changes are made. Since there is a large volume of work coming up in the out-of-free-zone in the very near future, these changes should be made immediately to do any good.

Contained herein is a list of jobs lost by two of our contractors in the out-of-free-zone area. This list was furnished by the local chapter of SMACNA and they are preparing other lists which will be mailed to me in the near future.

There are other area in which some action should be taken if Local #3 is going to police the work, even within their free zone. Such action should include some minor change in the overtime rate for residential servicemen. Enclosed are rates of union and nonunion service shops which were compiled by SMACNA.

In regard to the sign shops, there are seventeen shops in which we should have people. Currently, we have three shops signed, two of which are now employing four of our

members. Our current wage rate is the same as the building trades agreement, $8.00 per hr. including fringes. The Electrician rate is $6.43 per hr. including fringes, and the Painter's rate is $5.80 per hr. including fringes, except that he has a 2-week vacation in addition. I met with the sign shop industry committee, which is represented by SMACNA, and they were quick to tell me that as long as Local #3 insisted on the building trades contract for the sign shops they had no intention of hiring sheet metal workers if they could keep from it. So, some change must also be made in this area. However, in our meeting they did agree that at least four more shops would sign with Local #3 if we could come up with a reduced rate or some kind of freezing of the present rate.

Local #3 has a percentage of the wage rate which applies to swingstage work and amounts to approximately 55¢ per hr. at this time. The Ironworkers rate is approximately $1.83 below ours at the present time so this additional premium on top of our rate has almost put us out of the siding business. Therefore, something needs to be done here.

Our kitchen shop work is going fast but at this time I don't really know what needs to be done to save it.

Local #3 does not have a night air conditioning rate and the nonunion people are doing most of this in the small office buildings and the Business Agents have not been able to cope with this situation.

In my meeting with the Executive Board, I informed them that they were not in any way, shape of form either manning or servicing the out-of-free-zone area granted to them under their charter and that if they did not present to me by July 8th some type of arrangement which had been approved by their membership to service this jurisdiction, that the International Association would take some action that would give members of our International

the opportunity to work in the area. However, I did not tell them specifically what should be done because I felt they should have the chance to correct the situation in their own way.

Since that time, the Executive Board met with the union membership and did not recommend any changes and the members at that meeting informed the officers "To Hell with the International Association and the horse it came in on". Therefore, I can only recommend to you that the International Association take over Local #3 and do whatever is necessary to correct some of the aforementioned problems. I would not recommend such action if I though the Business Representatives were capable of overcoming the problems but I know that their hands are tied by the Executive Board and the membership and they cannot do anything to change the local situation.

Should you so desire, I have prepared a list of specific changes that I would make immediately and will furnish it upon your request.

Fraternally yours,

/s/ David E. Todd
David E. Todd
International Organizer

DET:mr
enc's.

Defendant's Exhibit 97

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
1000 Connecticut Ave.
Washington, D.C. 20036
Phone: 296-5880

October 18, 1971

Mr. David E. Todd
International Organizer
6409 North Central
Kansas City, Missouri 64118

Dear Sir and Brother:

This is in reference to your special report to me of July 9, 1971, concerning the situation prevailing within the jurisdiction of Local 3.

I have not acted on this report prior to this time in the forlorn hope that Local Union 3 would take self corrective action in the multitude of problems that they now face and have faced for some time. It is now rather obvious to me that this local has no intention of rectifying these horrible conditions on its own and I cannot permit such a disaster area to masquerade under the charter of a Local Union affiliated with this International Association.

Kindly update your report and send me your written recommendations in each of the areas you mentioned as to how we can begin rectifying this situation. Include in your recommendations sufficient date concerning rates free zones, travel allowances, conditions, etc. of the plumbers, pipefitters, ironworkers and electricians in the Omaha area.

Fraternally yours,

/s/ EDWARD J. CARLOUGH
Edward J. Carlough
General President

EJC/mha

cc: Mr. David S. Turner
Mr. Clarence Mulholland
ckrm.

Defendant's Exhibit 98

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
DAVID E. TODD
International Organizer
6409 North Central
Kansas City, Missouri 64118

December 7, 1971

Mr. Edward J. Carlough
General President
Sheet Metal Workers' International Association
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036

Dear Sir and Brother:

In reply to your letter of October 18, 1971, I have the following to report: The situation in Omaha, Nebraska Local Union #3 is basically the same as I outlined to you in my letter of July 9, 1971.

The travel pay and subsistance of the other trades you requested information on is as follows:

ELECTRICIAN

They have the same 20 road mile free zone as Local #3 and the United Association. Their travel and subsistance is combined together beginning with 20 to 25 miles—$2.00. 25 to 30 miles—$2.50 and with increases thereafter with $.50 per five miles with the last road mile being 100 miles or plus—$10.00. However in most cases jobs of any size and duration are usually negotiated on whatever amount the traffic will bear so that they can protect their jurisdiction. The business manager is able to accomplish this by the following claus in their contract which follows the travel and subsistance mutually satisfactory. Special arrangement may be worked out between the individual employer involved, and the union for large long time jobs. The journeymen rate as of Jan. 1, 1972 will be $8.30 per hour, an approximate fringe of $0.50.

UNITED ASSOCIATION

Thru May 14, 1972 is a total of $8.95 per hour including fringes, etc. Their free zone is 20 road miles from the center of Omaha, which is the same as our Local #3 has. An employee sent by the contractor outside the free zone will be paid 12 cents per mile from the free zone to the job site and back for each day of work. If an employee is required by the contractor to stay over night, his room and board will be paid. However there is another section of the contract which shoots this all to Hell. It states that the employer may select to hire outside of the free zone at the job site in this case travel and subsistance will be negotiated with the Local Union with a maximum of $10.00 per day for each day worked. So for all practical purposes the business manager makes the final determination on what the travel and subsistance should be on a job basis except for the superintendent for foremen which the contractor may send to the job site.

IRONWORKERS

Local #3 was unable to obtain an ironworker's agreement for me. So I will have to pass on what I have been told. Their total package including fringes is approximately $7.80 per hour. However an $1.25 of this total package was agreed upon during the freeze retroactive to June of 1971, therefore we are not sure exactly how he is going to come out on this. They do not have travel time or subsistance except what they may negotiate on a job to job basis and this has not been done very often.

My recommendation as to what should be done are as follows:

1. Place the Local Union under trusteeship.
2. Keep the present B. A. active in office.
3. Open the contract for negotiations.
4. Enlarge the free zone to a 25 to 30 mile radius to take in the town of Blair & Freemont, Nebraska and others in this circle.

5. The next circle would be a 50 or 55 mile radius zone with a total travel pay of $2.50 per day—Monday thru Friday.
6. The next circle would be a 75 or 80 mile circle with a total travel pay of $5.00 per day—Monday thru Friday.
7. The rest of the area of Local #3 is so open that I don't really know what to recommend at this time. But one thing is for sure Local #3 has 100% of nothing in the area.
8. On residential service men, their overtime should be 1½ after 8 hours per day and 40 hrs. per week only. This way some men can be scheduled Wednesday thru Sunday. Under the present set up we do not get any Saturday or Sunday service calls.
9. Reduce the wage rate in the sign shops or under our wage freeze problems, extend the contract for another two years.
10. Eliminate the 55 per hour premium for swinging stage work.
11. Establish a night air conditioner rate at time and one quarter for occupied office buildings.
12. Some changes in the kitchen shops but exactly what I don't know right now.
13. Establish a so called out-state contract so we can sign our shop outside the Omaha area.
14. If trusteeship can not be made to stick, reduce the jurisdiction of Local #3 to it's 20 road mile free zone and place it's jurisdiction with another or other locals that we can work out satisfactory agreement with.

Fraternally yours,

David E. Todd
International Organizer

DET:vk

Defendant's Exhibit 99

January 4, 1972

Mr. David E. Todd
International Representative
Sheet Metal Workers'
International Association, AFL-CIO
6409 North Central
Kansas City, Missouri 64118

Dear Sir and Brother:

This will confirm my telephone instructions of this date advising that you are directed, as my designated representative and on my behalf, to assume immediately the management and control of Local Union No. 3, Omaha, Nebraska.

This action is taken on the basis of the report and recommendation contained in your letters to me under date of July 8, 1971, and December 7, 1971, in which you set out the results of your investigation into the conditions existing in that Local Union. The grounds for my action are substantially those contained in your reports and are outlined in my letter of this date, addressed to Walter Brader, President of Local Union No. 3, a copy of which is attached hereto.

During such management and control, no expenditure of funds and no other official action shall be taken by Local Union No. 3 or the officers thereof without your or my express approval. You are instructed, however, that until further notice, you shall permit the Local Union and the officers and agents thereof to continue the day-to-day operations of the Local Union provided that the same do not conflict with your instructions or with any orders issued by me during the period of such management and control. You are hereby authorized to take any action which may be necessary to protect, preserve, and further the best interests of the Local Union, including the right to negotiate

agreements, or amendments or modifications of existing agreements by or on behalf of the said Local Union.

You are empowered to bind Local Union to contractual obligations by your own authority, and no person with whom you may transact business need obtain confirmation or authorization of your acts from any other officer or agent or from the membership of Local Union No. 3. It, of course, is understood that the funds and property of Local Union No. 3 shall continue to be used exclusively for the legitimate purposes of the Local Union consistent with the provisions of the International Constitution, subject only to your approval as to the validity of such expenditure.

I trust that you will be able to convince the membership that the conditions which gave rise to my action should be corrected promptly so that complete local autonomy may be restored as quickly as possible.

Fraternally yours,

EDWARD J. CARLOUGH
General President

EJC:nk

cc: Mr. Walter Brader, LU
David S. Turner, CST
Ckrm.
Donald W. Fisher, Esq.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-493

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; EDWARD J. CARLOUGH; and DAVID TODD, *Petitioners,*

v.

ANTHONY G. PIGNOTTI, as an individual member of Local #3 Sheet Metal Workers' International Association, *Respondent.*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September 17, 1973.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil No. 72-0-132

ANTHONY G. PIGNOTTI, as an individual member of LOCAL #3 SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *Plaintiff*,

v.

LOCAL #3 SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; SHEET METAL WORKERS NATIONAL PENSION FUND; LESTER FORMAN; WALTER BRADER; EDWARD J. CARLOUGH; DAVID TODD; OMAHA-COUNCIL BLUFFS SHEET METAL CONTRACTORS ASSOCIATION (NOW SMACNA-OMAHA-COUNCIL BLUFFS, INC.), *Defendants*.

Order

This matter comes before the Court for decision.

Pursuant to the Memorandum Decision to be issued in this matter, the Court finds that:

1. The defendant, Omaha-Council Bluffs Sheet Metal Contractors Association is dismissed as a party defendant;

2. The defendant, Sheet Metal Workers National Pension Fund, is dismissed as a party defendant;

3. The defendants will be jointly and severally liable for damages in an amount equal to the amount of money that has been deducted from the wages of the members of Local #3 since August 2, 1971, and paid to the Sheet Metal Workers National Pension Fund. This amount should be calculated as of a date not to exceed 30 days from the date of this decision, as agreed upon by the parties and submitted to the Court for approval. If the defendants can legally obtain back from the Sheet Metal Workers National Pension Fund the amount of this judgment, it may be used to satisfy this portion of the judgment. The funds will be paid into an escrow account in the local bank used by Local #3. Following the negotiation of the new contract, if the parties can agree to a final vote to be binding for the duration of the new contract on the pension plan controversy, then the funds are to be held in the escrow account pending the outcome of the vote. If then the vote is for participation on a pension plan, the funds are to be paid from the escrow account to the particular plan chosen. If no agreement can be reached as to having a vote or the vote that is held is against any plan, then the funds are to be returned pro rata to the members of Local #3, from whose paychecks the funds were deducted, whether or not they are presently members of Local #3;

4. The defendants will be enjoined from further delaying the implementation of the October 22, 1971, vote and will be required to cease within thirty (30) days all participation on the part of the members of Local #3 in the Sheet Metal Workers National Pension Fund. This particular date should also be agreed upon by the parties and submitted along with the judgment amount as above ordered;

5. To insure that this decision is not futile, the defendants will be enjoined from negotiating into the new contract any pension provision more binding on Local #3 or its members than the present contractual provisions. In addition, the defendants will be enjoined from taking any action

to dissolve Local #3, in order to assign its members to other Locals that do participate in the National Plan.

IT IS SO ORDERED.

Dated this 30th day of May, 1972.

BY THE COURT

/s/ Robert V. Denney
ROBERT V. DENNEY
United States District Judge

Memorandum Decision

DENNEY, District Judge

This case has been tried to the Court without a jury and the following memorandum shall constitute the Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Since 1966, the Sheet Metal Workers International Association (hereafter the International Union) has promoted a national pension plan for all sheet metal local unions to join. That plan is called the Sheet Metal Workers National Pension Fund (hereafter National Plan).

In the month of July, 1969, Local # 3 Sheet Metal Workers International Association (hereafter Local #3), and the Omaha-Council Bluffs Sheet Metal Contractors Association (hereafter Contractors Association) entered into a collective bargaining agreement to expire on May 31, 1972. In that contract, Article VIII provides that:

> Section 14. Pension: The Employers agree that upon a thirty (30) days notice by the Sheet Metal Workers Local #3 to deduct specific amount on specific dates from the gross hourly wage rate as requested by the Union and pay said amount to the *Sheet Metal Workers Pension Fund.* By the execution of this Agreement,

> the Employer also agrees to enter into the appropriate Trust Agreement within the time limit specified above necessary for the administration of such fund and to designate the Employer Trustees under such Agreement hereby waiving all notice thereof and ratifying all actions taken or to be taken by such Trustees within the scope of their authority. (Emphasis added)

It was explained to the members and it was the understanding of the members at the time the contract was ratified that the above provision meant that the details of the pension plan would be decided later and that any plan before selection would be put to a vote of the members. The reference to "Sheet Metal Workers Pension Fund" did not refer solely to the National Plan.

At Local # 3's regular meeting on September 4, 1969, it was voted that a pension committee be elected to examine the various pension plans in which Local #3 could participate. At a subsequent meeting on January 8, 1970, Jim Pignotti, Paul Wild, Bob Holtz and Jim Newburger were elected to the Pension Committee. The Pension Committee met first on February 19, 1970, and discussed various possible plans. It met again on February 24, 1970, and listened to Paul Stuckenschneider, International Organizer from the International Union, on the merits of the National Plan. At the April 16, 1970, meeting, it was resolved to allow all parties an opportunity to present their individual plans before a recommendation was made. Thus, on May 4, 1970, Ken Fridrich, of Bankers Life, presented the latter's pension plan and on May 20, 1970, John Wilson, of the Prudential Insurance Company, presented its plan.

On July 6, 1970, Edward Carlough, General President of the International Union, wrote to Lester Forman, Business Agent of Local #3, regarding recent changes in the National Plan. The changes were discussed at the Pension Committee's meeting of August 3, 1970. At the meeting

of August 10, 1970, Don Schinzel, of Commercial Savings and Loan Association, presented its plan.

It was announced via the Local #3 monthly newsletter that there would be a special meeting on October 22, 1970, to vote on the "pension plan best for Local #3 and the amount of contribution to be submitted and the commencement date." On October 9, 1970, Stuckenschneider wrote to Forman that he would be at the October 22, 1970, meeting to explain the National Plan. At the meeting of October 22, 1970, the members voted not to vote on a pension plan until all members had seen all the plans available. On October 27, 1970, Stuckenschneider wrote again to Forman, this time asking for copies of any other plan presented to the members, that he could compare it with the National Plan. On December 18, 1970, the Pension Committee met again. Stuckenschneider and Dick Reznek from the International Union represented the National Plan and interrogated the Equitable representatives as to the merits of their plan. On December 30, 1970, Stuckenschneider wrote to Jim Pignotti, criticizing and evaluating the Equitable Plan. The Equitable Plan was again discussed at the regular meeting of Local #3 on January 7, 1971. Sometime in January of 1971, the various members of the Pension Committee drafted letters to the general membership regarding their individual recommendations on the pension plan question. All of the letters except that of Jim Pignotti were sent out to the membership. Jim Pignotti's letter was instead read to the membership at a subsequent regular meeting. Walter Brader's letter criticized the Equitable Plan. The letter of Bob Hotz recommended the National Plan. James Newburger's letter stated that he did not feel a local plan was advisable. Jim Pignotti recommended that no plan be adopted at that time. On January 24, 1971, Stuckenschneider wrote to Hotz regarding the earnings of the National Plan. Then, shortly thereafter, Lester Forman, the Business Agent and not a member of the Pension Committee, using apparently the same facilities Local #3 used to publish the monthly

newsletter, sent a letter to the members promoting the National Plan and entreating the members not to forget the special pension meeting on March 25, 1971. The monthly newsletter of Local #3 announced the special meeting for March 25, 1971, as the "purpose of this meeting will be to vote for or against a pension plan if accepted the amount of money to be contributed and the month contributions will begin." At the March 25, 1971, meeting, Forman made a motion that the National Plan be adopted starting June 1, 1971. The membership defeated the National Plan by a vote of 93-66.

At the next regular meeting on April 1, 1971, there was again a motion to have at the next regular meeting, as a special order of business, a vote on the pension plan but, if favorable, to table the amount of money until it could be determined what an expected raise in pay for the members would total.

At this point, it should be noted that the Union's Consituation and Ritual provides in Article Ten (10), Section 6—Meetings:

> Sec. 6(a). Each local union shall determine the times and places for the holding of its regular meetings, and determine how many of its members shall constitute a quorum. Special meetings shall be called by the local union president or upon the recommendation of the local Executive Board or upon the request of at least ten (10) members in good standing or ten percent (10%) of the members in good standing, whichever is the greater. The call for such special meeting shall specify the time, place and purposes thereof, and no subjects other than those specified in the call shall be considered at such meeting.

On April 10, 1971, Brader received a petition by more than ten percent (10%) of the members to call a special meeting to vote again on the pension plan. There appears

to have been no hesitancy in Brader's willingness to honor the petition. However, since the pension plan was already scheduled to be voted upon, Brader saved the petition, instead of indicating that the vote of May 6, 1971, should satisfy the petitioners. At the May 6, 1971, meeting, it was voted 58 to 43 that Local #3 did not want a pension plan. Later in the meeting, a motion was made, according to the minutes, to "postpone indefinitely the pension plan and reference thereto. (Rule 23)" Rule 23 of the Constitution and Ritual of the Union provides that "[w]hen a question is postponed indefinitely it shall not come up again except by a two-thirds (⅔) vote." The vote was taken and by Brader's count the motion was defeated 29 to 24. Quickly, a division of the house was called which revealed that the true vote was 60 to 30 in favor of postponing the pension plan consideration indefinitely. Brader used the petition he had previously received to call another special meeting for June 2, 1971, to vote again, this time by secret ballot, whether or not to begin contributing 20 cents to the National Plan. Such contributions were to begin on July 2, 1971. In the meantime, Brader frantically sought help from Carlough and received via Lonnie Gaither, assistant to Carlough, the bald conclusion that the motion to divide the house during the May 6, 1971, meeting was out of order. Before the vote could be forced at the May 27, 1971 meeting, a point of order was made that the meeting itself was out of order, since it had been called specially to vote on the pension question and Rule 30 of the Constitution and Ritual controlled. Rule 30 provides that "[w]hen a question has been decided, it can be reconsidered only at the same meeting or on the next regular meeting night." This not being a regular meeting, the question could not be reconsidered. Brader overruled the point of order. The ruling of Brader was challenged by the membership and the challenge was sustained upon vote of the members.

Brader was undaunted by this third defeat of the pension plan within as many months and again besought Carlough

to personally intervene, which Carlough did by using his power as General President to call yet another meeting, this time for June 21, 1971, to vote again on the National Plan. At the June 21, 1971, meeting, the secret vote was 77 for, 71 against and 3 void ballots. Brader, Forman, Carlough and their supporters had finally succeeded in getting a favorable vote to the plan. Brader quickly wrote to Robert Hooker, the Executive Director of the Contractors Association to begin deducting on August 1, 1971, 20 cents per hour and sending it to the National Plan. It is interesting to note that the International's monthly magazine for July showed a map, apparently as of June 15, 1971, listing all locals and their locations that were then participating in the National Plan. Local #3 was listed as participating in the National Plan, although, as of June 15, 1971, the plan had been beaten three times in a row. The International was apparently very confident as to the anticipated outcome of the June 21, 1971, vote.

The members against present implementation of a pension plan were amazed at the vote and decided to attempt to use the special meeting provisions of the Constitution and Ritual that Brader had previously been so eager to allow. On June 23, 1971, several petitions were circulated to obtain the required ten percent (10%) signatures. Forman was presented with the petition, but he said there weren't enough signatures and rejected it. Sometime in July, 1971, Forman visited Tony Pignotti, Jim Pignotti's brother, and the plaintiff herein at the jobsite where Tony Pignotti was working. Forman told Tony Pignotti to keep his mouth shut, that the International could fine him if it chose.

On July 9, 1971, David Todd, an agent for the International Union who had been investigating and monitoring Local #3's activities, wrote Carlough that the International should take over Local #3 now, ostensibly because Local #3 was not getting enough jobs out in the state.

Finally, on July 15, 1971, with an overwhelming number of signatures having been obtained, Brader accepted the petition, but said it was too late. Conservations with Brader on succeeding nights proved fruitless. On July 26, 1971, with the August 1, 1971, time for beginning deductions rapidly approaching, Jim Pignotti and 113 other members filed suit in this Court to enjoin the deductions and requiring Brader to honor the petition. In that suit, the Court was alleged to have jurisdiction to entertain the suit pursuant to 29 U.S.C.A. § 106, governing employer payments to unions. The Court sustained a motion by defendants to dismiss on grounds of no jurisdiction under that statute.

On August 31, 1971, Brader wired Carlough again, this time informing him about the dismissal of the Court action and asking Carlough what to do about the petition. Carlough wired back on September 1, 1971, that Carlough was declining to decide whether to honor the petition or not, but that Brader should make a decision. Carlough stated that if the members didn't like Brader's decision then they could appeal it, which would be to Carlough himself. Finally, Brader decided to honor the petition and the monthly newsletter announced a special meeting for October 22, 1971, to vote on the pension plan again. On October 18, 1971, Todd received a letter from Carlough to update his reasons for taking over Local #3. At the October 22, 1971 meeting, by far the largest turnout of members of the union, the members voted 175 to 119 not to retain the National Plan.

On October 27, 1971, Brader telegraphed the Contractors Association that a meeting was desired to discuss how to cease the pension plan deductions. However, subsequent actions indicate to the Court that there was never any real desire of the defendants to implement vote of the members of October 22, 1971, and that the telegram itself was, at best, self-serving. On November 3, 1971, formal charges were filed with the International Union by the Local Execu-

tive Board against James Pignotti, alleging that he had violated the International Union's Constitutional provision of "[e]ngaging in any conduct which is detrimental to the best interests of this association or any subordinate unit thereof or which will bring said union into disrepute." The Executive Board of Local #3 has seven members, of which Brader and Forman are two. The alleged violation occurred when James Pignotti had told a local newsman the results of the October 22, 1971, vote.

Almost a month had passed since the vote, with nothing having been accomplished to implement the vote of October 22, 1971, when, on November 15, 1971, James Pignotti filed formal charges against Forman for refusing to implement the vote and appealed to Carlough to do something about Brader and Forman's refusal to follow the will of the majority of the members. The next day, on November 16, 1971, the Executive Committee of Local #3 voted to send another telegram to the Contractors Association, requesting a meeting, and such telegram was sent on November 17, 1971. In contrast, when the plan passed in June, 1971, there were apparently no similar problems in getting together with the Contractors Association to start the deduction. On November 30, 1971, Edward Fogarty, attorney for plaintiffs, wrote to Carlough that suit was being filed but would be stayed if the necessary acts to terminate the plan were completed by December 15, 1971. On December 1, 1971, the Executive Board met with the Contractors Association. The Contractors reasonably requested that any request to delete the plan be made in writing, and in such a maner that it needed no further ratification of the union; (2) that the Contractors receive a release for any liability on their part; and (3) that the pension plan could not be reinstated during the life of the contract, which was approximately six more months. The monthly newsletter of Local #3 indicated that, although the Executive Board of Local #3 had met with the Contractors Association, they would need a legal opinion before proceeding.

On January 4, 1972, Carlough wrote to Todd and told him to take over the Union as trustee, that the letter was in confirmation of telephone instructions regarding the take-over, and that there would be no expenditure of funds or other official action without Todd's express approval. On January 5, 1972, Carlough wrote to James Pignotti that Carlough wouldn't take any action on the appeal of Pignotti to Carlough of the refusal of Brader and Forman to implement the vote of October 22, 1971, because he would have to pass on the legality of the meeting and the duties of the business agent and this might prejudice charges against the business agent. The news of the take-over was announced to the membership at the January 6, 1972, regular meeting of Local #3. At that meeting, a letter was read from Attorney Fogarty, plaintiff's attorney, that stated that the National Plan required that a member work 1200 hours after adoption of the Plan before he had any vested rights in the Plan. No one on January 6, 1971, had the required 1200 hours, although several members would accumulate the required 1200 hours sometime in late January, 1972. Attorney Fogarty also gave his opinion of the tactics used by the minority to stall the implementation of the October 22, 1971, vote and the lack of legal hurdles in putting it into effect. A letter was also read from Attorney Weinberg, the Union attorney, to the members, to the effect that any official who agreed to deletion of the Plan might violate fiduciary duties to act for the best interests of the people they represent. Todd stated at the meeting that he would let the members do anything they wanted to do about the plan, but when the motion was made to have Attorneys Weinberg and Fogarty get together at Union expense to implement the October 22, 1971, vote, Todd said the Plan was going to be left alone, Todd would be able to negotiate the Plan into the contract coming up in June of 1971, and the members would not be allowed to vote to ratify the contract. In a later meeting with Tony Pignotti and some of the other members, Todd told Tony Pignotti that he would not take steps to end the Plan.

On January 29, 1972, Jim Pignotti died and this suit was brought by Tony Pignotti, his brother.

On March 23, 1972, the International Union held a hearing on the trusteeship that Carlough had imposed on Local #3. The hearing was held in Washington, D. C., and it affirmed the trusteeship.

The plaintiff alleges that the foregoing facts as found by the Court constitute violations of 29 U.S.C.A. §§ 411 (a)(1) and 501.

29 U.S.C.A. § 411(a)(1) provides that:

> Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C.A. § 501 provides in part:

> (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constituion and bylaws and any resolution of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any manner connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any

profit received by him in whatever capacity in connection with transactions conducted by him or under his direction or in behalf of the organization. . . .

Before moving to the specific violations, the Court finds that it should sustain the motion to dismiss this action as to the Contractors Association. It is clear that neither 29 U.S.C.A. § 411 or § 501 reaches a claim against an employer. *Duncan* v. *Peninsula Shipbuilders Association*, 394 F.2d 237 [4th Cir. 1968] and *Aho* v. *Bintz*, 290 F.Supp. 577 [D. Minn. 1968]. The Court also sustains the motion to dismiss as to the defendant, Sheet Metal Workers National Pension Fund.

Except for Carlough, the trustees of the fund are not before the Court and the trustees are indispensible parties to any direct action against the fund. *Warshaw* v. *Local No. 415, International Ladies' Garment Workers Union*, 325 F.2d 143 [5th Cir. 1963].

§ 411 Violations

The Court finds from the facts set out above that defendants, Carlough, Brader and Forman, early in 1971 set out to obtain the participation of Local #3 in the National Plan, whether the majority of the Union wanted the Plan or not. The repeated votes, especially after the motion to postpone indefinitely, amply demonstrate the singlemindedness of these defendants. The use by Carlough of his power to call the election of June 21, 1971, in the aftermath of the three defeats of the Plan in and of itself violated the members' § 411 rights to an equal right to vote and to have that vote be meaningful. The delay by Brader and Forman in calling the special meeting mandated by the petition of July 15, 1971, denied the plaintiff his § 411 rights to equal rights and privileges to participate in the meetings of Local #3. The blatant refusal of Brader, Forman and Carlough to implement the vote of October 22, 1971, denied the plaintiff his § 411 right to vote as effectively as if they

had stuffed the ballot box itself, which has been held to be a violation of § 411. *Beckman* v. *Local No. 46 International Ass'n of Bridge, S. & O. I. Workers*, 314 F.2d 848 [7th Cir. 1963]. Defendant Carlough specifically violated § 411 when he took over the Union and appointed trustee Todd. The Court is convinced that the purpose of the trusteeship was to prevent any further action of the members toward implementing the vote to discontinue the Plan. In these circumstances, abolishment of the right to vote via a trusteeship amounts to a denial of the § 411 right to vote and cannot be said to be a reasonable rule or restriction on that right. This trusteeship is akin to a classification of all members as associates or second class members. Such has been held to be an unequal application of the right to vote and violative of § 411. *O'Brien* v. *Paddock*, 246 F.Supp. 809 [S.D. N.Y. 1965]. *See* also *Vestal* v. *International Brotherhood of Teamsters*, 245 F.Supp. 623 [M.D. Tenn. 1965]. Finally, defendant Todd's refusal to implement the vote of October 22, 1971, and his intentions to seal the tomb on the controversy by negotiating it into the future contract and then not to allow the members to ratify it constitutes a violation of § 411. The power of office in the Union cannot be used to adopt rules the effect of which is to deny the members the right to an equal vote. *Libutti* v. *DiBrizzi*, 337 F.2d 216 [2nd Cir. 1964]. Although Todd might, as a trustee, prevent future meetings and votes, nowhere has it been held that the trustee can upset the results of meetings and votes occurring prior to the imposition of the trusteeship. The International Union will be bound by the acts of its agents, Carlough and Todd. *International Brotherhood of Teamsters* v. *United States*, 275 F.2d 610 [4th Cir. 1960].

§ 501 VIOLATIONS

This Court is guided by the opinion of Judge Larson in *Nelson* v. *Johnson*, 212 F.Supp. 233 [D. Minn. 1963], and of the Eighth Circuit in that case on appeal, *Johnson* v. *Nelson*, 325 F.2d 646 [8th Cir. 1963] as to what constitutes violations of § 501. "§ 501 imposes fiduciary re-

sponsibility in its broadest application and is not confined in its scope to union officials only in their handling of money and property affairs." *Johnson* v. *Nelson*, supra, at p. 651.

It is clear to the Court that all of the defendants have breached their fiduciary duties in allowing their personal feelings to interfere with their duties as officers. Defendants Brader and Forman early demonstrated their allegiance to the National Plan. Brader by the use of his position as President repeatedly called meetings and then prevailed upon Carlough to call another meeting to secure an affirmative vote of the members. Forman went so far as to use the facilities of Local #3 to publish and influence the views of the members. Then, having finally achieved an affirmative vote, Brader and Forman delayed any other vote. Unable to delay any longer, they did the next best thing and refused to implement the vote of October 22, 1971, against the National Plan.

Counsel for the defendants has argued that the Court should take no action because there are members who now, because of the delay, have vested rights under the Plan. It was no doubt the idea of the defendants that, if they delayed, the Court would be unable, vesting having occurred, to unscramble the situation, and negotiating the Plan into the new contract would finish off the plaintiff.

The Court is not unmindful of the position of these members who may have vested rights under the Plan, but it is confident that they will be able to seek separate redress against the defendants who have caused their plight, should they be so inclined. It is not the plaintiff who should be prejudiced by the tardiness and breach of their fiduciary duties by the defendants.

Defendant Carlough breached his § 501 trust when he joined or led Brader and Forman in their efforts. His calling of the June 21, 1971 meeting, in light of the past defeats of the National Plan and the motion to postpone in-

definitely, and finally taking over the Union itself amount to total disregard of his § 501 trust. Defendant Todd, as trustee, breached his own § 501 trust duties when he refused to allow the vote of October 22, 1971, to be implemented and supplemented it with an intent to negotiate the Plan into the new contract and not allow the members to ratify the new contract. The International Union will be bound by the acts of its agents, Carlough and Todd. *International Brotherhood of Teamsters* v. *United States*, supra. Like *Johnson* v. *Nelson*, supra, this Court concludes that actions by the officers to refuse to implement a vote of the majority violates § 501 and cannot be allowed to pass without relief. "*If* there have been some labor union officials who have thought that they could flaunt the rights of the union member with immunity from the courts, they should be thoroughly disabused of the notion. . . . This Court sees no reason to leave the slightest doubt in the mind of the autocratic union official that the will of Congress [in enacting § 501] is going to be strictly enforced." *Nelson* v. *Johnson*, supra, at p. 273.

RELIEF

29 U.S.C.A. § 412 provides that for violations of § 411 the Court may give "such relief (including injunctions) as may be appropriate."

29 U.S.C.A. § 501(b) provides that the member may recover "damages or secure an accounting or other appropriate relief for the benefit of the labor organization."

It has been held that the injunction under § 411 can be mandatory in form, *Magelssen* v. *Local Union No. 518, Operative Plasterers*, 240 F.Supp. 259 [W.D. Mo. 1965]. In that case, the Court ordered the local which had wrongfully transferred a member's dues book to the international union to exercise its best efforts to secure the return of the book. An award of $500 to each union member who was improperly disciplined by the union was held not to be

excessive relief under § 411 in *Local Lodge #455, Int. Bro. of Boilermakers* v. *Terry*, 398 F.2d 491 [5th Cir. 1968]. In *Nelson* v. *Johnson*, supra, the remedy fashioned pursuant to § 501 was to require the officials of the union to implement the vote of the majority of the members, which they had been refusing to do.

Here, the Court, in accordance with the principles of the foregoing decisions, will grant the following relief for the proven violations of §§ 411 and 501 by the defendants:

1. The defendant, Omaha-Council Bluffs Sheet Metal Contractors Association will be dismissed as a party defendant.

2. The defendant, Sheet Metal Workers National Pension Fund, will be dismissed as a party defendant.

3. The defendants will be jointly and severally liable for damages in an amount equal to the amount of money that has been deducted from the wages of the members of Local #3 since August 2, 1971, and paid to the Sheet Metal Workers National Pension Fund. This amount should be calculated as of a date not to exceed 30 days from the date of this decision, as agreed upon by the parties and submitted to the Court for approval. If the defendants can legally obtain back from the Sheet Metal Workers National Pension Fund the amount of this judgment, it may be used to satisfy this portion of the judgment. The funds will be paid into an escrow account in the local bank used by Local #3. Following the negotiation of the new contract, if the parties can agree to a final vote to be binding for the duration of the new contract on the pension plan controversy, then the funds are to be held in the escrow account pending the outcome of the vote. If then the vote is for participation in a pension plan, the funds are to be paid from the escrow account to the particular plan chosen. If no agreement can be reached as to having a vote or the vote that is held is against any plan, then the funds are to be returned pro rata to the members of Local #3, from whose

paychecks the funds were deducted, whether or not they are presently members of Local #3.

4. The defendants will be enjoined from further delaying the implementation of the October 22, 1971, vote and will be required to cease within thirty (30) days all participation on the part of the members of Local #3 in the Sheet Metal Workers National Pension Fund. This particular date should also be agreed upon by the parties and submitted along with the judgment amount as above ordered;

5. To insure that this decision is not futile, the defendants will be enjoined from negotiating into the new contract any pension provision more binding on Local #3 or its members than the present contractual provisions. In addition, the defendants wil be enjoined from taking any action to dissolve Local #3, in order to assign its members to other Locals that do participate in the National Plan.

Dated this 31st day of May, 1972.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1411

ANTHONY G. PIGNOTTI, As an Individual Member of Local #3 Sheet Metal Workers International Association, Appellee,

v.

LOCAL #3 SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; LESTER FOREMAN; WALTER BRADER; EDWARD J. CARLOUGH; and DAVID TODD, Appellants.

Appeal from the United States District Court
for the District of Nebraska

Submitted: February 12, 1973

Filed: April 20, 1973

Before GIBSON and ROSS, Circuit Judges, and BENSON,* District Judge.

GIBSON, Circuit Judge.

Opinion of the Court of Appeals

This case concerns the merits and the applicability of §§ 411 and 501 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 501 and 411,[1] (com-

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* United States District Judge for the District of North Dakota, sitting by designation.

[1] 29 U.S.C.A. § 411(a)(1) provides that:

"Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to

monly referred to as the Landrum-Griffin Act) to an internal dispute between certain union members and certain of the officers of a Local and International Union. The District Court of Nebraska, Judge Robert Denney, granted relief in an opinion reported in 343 F.Supp. 236 (D.Neb. 1972).

Plaintiff Anthony Pignotti is suing as an individual member of Local Union Number 3, Sheet Metal Workers' International Association. There are six defendants; Local No. 3, Sheet-Metal Workers' International Association (Local No. 3); Sheet Metal Workers' International Association (International Association); Lester Foreman, Business Agent for Local No. 3; Walter Brader, President of Local No. 3; Edward J. Carlough, General President of the International Association; and David Todd, Interna-

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nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

29 U.S.C.A. § 501 provides in part:

"(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party or in any manner connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction or in behalf of the organization. . . ."

tional Representative of the International Association and trustee of Local No. 3 under a trusteeship imposed by the International Association. The Omaha-Council Bluffs Sheet Metal Contractor Association and the Sheet Metal Workers' National Pension Fund (National Fund) were named defendants in the complaint but have been subsequently dismissed.

Under the collective bargaining agreement entered into on July 26, 1969, and running to May 31, 1972, the Contractor Association agreed that upon 30 days notice by Local No. 3, its members would begin deducting a designated amount from wages and pay that amount into a pension fund. A Pension Committee was appointed by Local No. 3 to study the various alternative pension arrangements. The committee met at various times from February 19, 1970, until December 18, 1970. The original members of the committee were Robert Wild, James Pignotti, the brother of the plaintiff, James Newberger, and Robert Holtz. At a later date Robert Wild left the committee and was replaced by defendant Walter Brader (president of the Local) who appointed himself to the committee. The committee contacted a number of major insurance companies and received proposals from at least two of them. In addition the committee heard proposals from a savings and loan association and from the National Fund.

The committee submitted a final report in January 1971. The members of the committee were not in agreement. Three pension plans, including the National Plan were sent by mail to the membership of Local No. 3 accompanied by letters of position by each of three of the four members of the pension committee. (James Pignotti for some reason was not included.) A special meeting was called for March 25, 1971, "to vote for or against a pension plan," and if approved, "the amount of money to be contributed and the month contributions will begin." The

motion put by defendant Lester Foreman, however, was to adopt the National Plan. On a standing vote the motion was defeated, 66 for to 93 against.

At the next regular meeting, April 1, 1971, a motion was made to have a special order of business at the next regular meeting to vote on the question "to have or not to have a pension plan." That motion carried. In the interim on April 20, 1971, a petition was presented in proper form to President Brader requesting a special membership meeting to vote by secret ballot whether "to commence contributing 20¢ to the [National Plan] on June 2, 1971." Brader stated that he did not honor the petition at that time because of the special order of business which would vote on the plan at the next regular meeting.

That meeting was held on May 6. The motion was orally submitted to the members whether to have any plan. The vote was taken by secret ballot with the voters writing either yes or no on a blank piece of paper. There were 58 "no" votes and 43 "yes" votes. After this motion had been disposed of a motion was made by James Pignotti "to postpone indefinitely the pension plan and reference thereto (Rule 23)".[2] The vote on this motion by show of hands was announced by Walter Brader as 24 "for" and 29 "against." A division of the house was called for and the vote taken again with the result of 60 "for" and 30 "against" the motion. Thus the motion passed.

President Brader wrote to the International Association to inquire whether the procedure followed at this meeting was proper. He was answered by Lonnie Gaither, assistant to General President Carlough, and advised that the motion to postpone indefinitely was out of order because no

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[2] The reference to "Rule 23" is a reference to Rule 23 of the Ritual of the International Association which reads: "When a question is postponed indefinitely, it shall not come up again except by two-thirds vote."

main motion was pending at the time of the motion[a] and that the vote by a division of the house was not proper because he had already declared the vote on the question before the vote by division of the house was called for under Rule 27 of the Ritual.

Brader then decided to honor the petition for the special meeting which had been presented to him on April 20. The announcement of the meeting was by post card and read:

> "The purpose of this meeting will be to vote by secret ballot for Sheet Metal Workers No. 3 to commence contributing 20¢ to the Sheet Metal Workers National Pension Plan on June 2, 1971."

After this meeting was called to order but before a vote could be taken on the pension plan, Jess Steward raised a point of order challenging consideration of the pension plan on the grounds that "the issue was defeated at the last regular meeting, and this meeting constitutes a motion to reconsider and this is out of order." President Brader overruled the point of order. The chair was challenged and the challenge upheld by a vote of 51-50. A motion to adjourn was made, a point of order raised against the adjournment and overruled by the chair, and the motion to adjourn passed. No vote on the pension plan was taken at this meeting. A protest against the adjournment was made to General President Carlough by a member present at the meeting. Brader also wrote to Carlough and asked if the International Association could exercise its powers to call a special meeting to vote on the pension plan.

On June 11, 1971, the representative of the International Association, Eugene Edwards, notified the officers of Local No. 3 that he was calling a special membership meeting of the Local for June 21. On June 15, written notice of this

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[a] The Union cites Robert's Rules of Order as authority for this ruling. Robert's Rules are made applicable to the local under Rule 5 of the Ritual.

meeting was mailed to the entire membership. The meeting took place and 151 members signed in. There were 77 votes for participation in the National Plan, 71 against participation and 3 votes were not counted as incorrectly marked. On June 29 President Brader gave notice to the Contractor Association that the plan was to be put into effect as of August 1.

A petition was then circulated by the anti-pension group and on July 15 it was presented by Brader. It was signed, as required, by more than 10 per cent of the membership of Local No. 3 and called for a special meeting "for the purpose of voting down the pension contributing plan previously passed on June 21, 1971." Receiving no response to this petition, a complaint was filed on July 26, 1971, in the United States District Court for the District of Nebraska asking the Court to require a special meeting of Local No. 3. This suit was dismissed by the Court on August 31, 1971, for failure to state a claim.

A special membership meeting was called for October 22, 1971, pursuant to the petition. The members voted by secret ballot. The vote was 175 against retaining the National Plan and 119 in favor of the Plan.

On October 20, Brader sent a telegram to the Contractor Association requesting a meeting about the pension plan. No response was received to this communication. A second telegram was sent on November 17 and the Contractors responded agreeing to the meeting. The meeting was held on December 2. The Contractor Association agreed to reopen the contract to delete the pension plan but stated that they would require the Union to accept three conditions.[4] Local No. 3 requested an opinion from its attorney

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[4] The conditions were:

"1. It [the request] is made in writing and in such a manner that it needs no further union ratification to complete the re-opening and execution of all necessary documents.

"2. The pension trustees release the contractor's association from all liability for the deletion and the union agrees to hold

on the contractors' conditions and he submitted an opinion letter on January 3, 1972, in which he advised against agreeing to these conditions.

On January 4, 1972, Local No. 3 was placed under a trusteeship by General President Carlough. David Todd, an International Representative, was trustee. On March 23, 1972, the General Executive Council ratified and approved this action. There was no opposition to the trusteeship presented to the Council. David Todd has indicated that he will continue the Local's participation in the pension plan.

The foregoing is a chronology of the events which led this dispute to the United States District Court. From these facts and the other findings of fact that Court found:

> ". . . defendants, Carlough, Brader and Foreman, early in 1971 set out to obtain participation of Local #3 in the National Plan, whether the majority of the Union wanted the plan or not * * * that the purpose of the trusteeship was to prevent any further action of the members toward implementing the vote to discontinue the Plan." *Pignotti* v. *Local No. 3 Sheet Metal Workers Int. Ass'n*, 343 F.Supp. 236, 243-44 (D.Neb. 1972).

The Court further found that these activities constituted violation of both § 411 and § 501 and ordered relief as follows:

(1) The defendants are jointly and severally liable for damages in the amount deducted from the wages of the

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the association and it's [sic] members harmless from any liability from deletion of the pension trust.

"3. In the event agreement is reached to delete the pension provision as requested it will be conditioned that the pension cannot be re-instated during the remainder of this contract."

members of Local No. 3 since August 2, 1971, and paid to the Sheet Metal Workers' National Pension Fund.[5]

(2) Defendants are required to cease within 30 days participation on the part of the members of Local No. 3 in the Sheet Metal Workers' National Pension Fund.

(3) Defendants are enjoined from negotiating into any new contract any pension provision more binding than the one contained in the contract of July 26, 1969.

(4) Defendants are enjoined from dissolving Local No. 3 in order to assign its members to locals that do participate in the National Plan.

Appellants claim that certain of the findings of fact by the trial court are clearly erroneous. Although appellants' presentation of these issues lack specificity in some instances, we have reviewed the objections and think the District Court's findings of fact have sufficient evidentiary support in the record. They are, therefore, not clearly erroneous.

Appellants' legal arguments on this appeal can be divided into four areas. (1) The nature of the pension plan as the subject of collective bargaining brings it outside the scope of the Landrum-Griffin Act. (2) The appellants did not violate § 411. (3) The appellants did not violate § 501. (4) Some members of the Union may have now acquired vested rights in the pension plan which cannot be destroyed since they are not parties to this action.

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[5] The Court held that if the defendants could legally recover the amount of this judgment that had been paid into the Pension Fund, such amount could be used to satisfy this judgment. The funds are to be put into an escrow account. Following the new contract, if the parties can agree to a new and final vote on the question of participation in a pension fund such shall be held. If the vote favors participation the funds are to be paid from the escrow account to the particular fund chosen. If the vote opposes participation or if no agreement can be reached on having a vote the money is to be paid pro rata to the members of Local No. 3 from whose paychecks the funds were deducted.

Collective Bargaining

Appellants' collective bargaining argument is that participation or non-participation in the pension plan is a collective bargaining issue rather than an internal union issue and that only internal union issues are the proper concern of the Landrum-Griffin Act. This argument is not well taken. The action seeks to preserve the democratic processes in Local No. 3, a proper subject of concern under the Landrum-Griffin Act. The issue raised is whether the method used by the Union officials to secure the Local's participation in the plan, violated §§ 411 and 501 of the Act.

Section 411

Appellants argue that each and every step in the passage of the Pension Plan was in accord with the International's Constitution and by-laws (including Robert's Rules of Order), and thus cannot constitute a violation of § 411. They argue that far from denying democratic participation in the union affairs to the members of the local that they actually preserved such rights by their actions.[e] Appellants cite *Vestal* v. *Hoffa*, 451 F.2d 706, 709 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972) for the proposition that the union officials and not the courts are the proper parties to interpret the union's constitution. We agree generally with this proposition of law, provided, as recognized in *Vestal*, that the interpretations are fair and reasonable. But we also recognize, as did the Court in *Sabolsky* v. *Budzanoski*, 457 F.2d 1245 (3d Cir.), *cert. denied*, 409 U.S.

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[e] Nevertheless it appears that the District Court's finding that plaintiff and the anti-pension group were unfairly treated by the Union's procedural decisions is correct. An example of this is the Union's position that the vote favorable to the plaintiff on the motion to postpone indefinitely was improper because the chair had already announced the vote. The primary purpose of a call for a division of the house is to test the chair's announcement of the vote in situations such as this where the chair's announcement was obviously incorrect.

853 (1972) that "[C]ourts have not hesitated to strike down so-called 'authorized' union conduct alleged to be based on a rule or by-laws fairly interpreted, where such conduct violates the provisions of the Landrum-Griffin Act." 457 F.2d at 1252. In our own case of *Johnson* v. *Nelson*, 325 F.2d 646 (8th Cir. 1963) we cut past the question of whether the interpretation of the by-laws and constitution of a union was "authorized' to determine whether the conduct of the union officials, in refusing to act according to the majority vote of the membership, constituted a violation of their § 501 fiduciary duties. The Act does not permit the violation of rights guaranteed to union members under § 411 upon a showing that the violation was in accord with the union's constitution and by-laws.

Appellants further argue that the allegation by the plaintiffs and the finding by the Court that the trusteeship was imposed for the purpose of preventing any further action by the members to implement the vote to withdraw from the National Plan was in effect an impermissible collateral attack on the trusteeship and not a direct attack as provided in § 464. Appellants contend that this deprived them of the benefit of the statutory presumption of validity which attaches to a trusteeship under § 464(c) for a period of 18 months, absent "clear and convincing proof" that the trusteeship was not established for a purpose allowable under the statute. Appellee correctly points out that the presumption is operative only in proceedings pursuant to that section of the Act attacking the validity of the trusteeship, and that Judge Denny did not invalidate the trusteeship but only found that it was established by Carlough for a purpose which was a violation of both § 411 and § 501. There was no finding that the ratification of the trusteeship by the International's Executive Council was for a purpose other than one allowed by the Act and thus the trusteeship is still valid.

We also note 29 U.S.C. § 466 provides that the remedies provided by the subchapter of which it is a part, which

includes § 464, are not exclusive. Thus the right to sue under § 412 is not affected by the right to attack trusteeships under § 464. The 18-month presumption of validity for trusteeships is available only in proceedings under § 462.

The District Court held that Trustee David Todd violated § 411 by refusing to take steps to implement the October 22 vote to withdraw from the National Plan and by his expressed intention to incorporate the National Plan into the next contract which would be negotiated while he was trustee and thus not be subject to ratification by the membership of Local No. 3. The Court recognized that a trusteeship suspends local autonomy for the duration of the trusteeship and that the trustee has no obligation to call meetings or allow the members to vote. However, the Court held that the trustee did have an obligation to carry out the vote which had been made prior to the imposition of the trusteeship. While we can find no cases on this issue, we believe that a trustee, as a fiduciary, has an obligation to correct the effects of past denials of rights guaranteed to union members by § 411, and his failure to correct these past injustices is in itself a violation of § 411 as well as being a violation of § 501. The Congressional impositions of fiduciary obligations upon agents and officers of unions would be meaningless if all of these duties could be abrogated by the mere device of imposing a trusteeship. Past wrongs call for a remedy, not technical objections.

SECTION 501

Initially all parties agree that neither the International Association nor Local No. 3 have violated § 501 as that section imposes liability only on the individual union officials. See, *Sabolsky* v. *Budzanoski*, 457 F.2d 1245, 1249 (3d Cir), *cert. denied*, 409 U.S. 853 (1972).

We are invited by the appellants to reconsider our holdings in *Johnson* v. *Nelson*, 325 F.2d 646 (8th Cir. 1963),

concerning the scope of § 501(a), on the basis of contrary decisions in the Second and Ninth Circuits. In *Johnson* v. *Nelson* we were concerned with a situation similar to the one in the instant case. The court there found that because of personal feelings the officials of a local union had refused to pay certain attorney's fees that had been approved by a constitutional vote of the membership. *Johnson* viewed § 501 as imposing broad fiduciary duties on the officers, agents, shop stewards, and other representatives of a labor organization and that the officers by allowing their personal feelings to interfere with the performance of their duties "failed 'to refrain from dealing with such organization [Local] as an adverse party or in behalf of an adverse party in any matter connected with his [their] duties' [§ 501(a)]." 325 F.2d at 653. These acts constituted a breach of their fiduciary duties imposed by § 501(a). The Second Circuit in *Gurton* v. *Arons*, 339 F.2d 371 (2d Cir. 1964) and *Coleman* v. *Brotherhood of Ry. & Steamship Clerks, Freight Handlers, Express & Station Employees*, 340 F.2d 206 (2d Cir. 1965), has restricted the scope of § 501(a) only to situations involving "money and property" of the union. The Ninth Circuit appeared to follow *Gurton* in *Phillips* v. *Osborne*, 403 F.2d 826 (9th Cir. 1968). However, that Court in a recent case explicitly held this issue to be an open one in that Circuit, stating:

> "The position of the court in Johnson v. Nelson that § 501 is not limited to breaches of trust directly involving officers' handling of union money or property has been termed the 'majority' view. Cefalo v. Moffet, D.C. Cir., 1971, 449 F.2d 1193, 1198 n.15. The question remains open in this circuit. Our citation of Gurton v. Arons, *supra*, in Phillips v. Osborne, 9 Cir. 1968, 403 F.2d 820, 830, does not commit us to follow *Gurton*. We cited *Gurton* as merely illustrative of a point of view." *Kerr* v. *Shanks*, 466 F.2d 1271, 1275 n.2 (9th Cir. 1972).

The reason for the difference in interpretation between *Gurton* and *Johnson* can be found in the interpretation of the legislative history of the Act as it was considered by each court.

The Second Circuit in *Gurton*, as to the legislative history of the Act, referred the reader to the opinion of the district court, *Guarnaccia* v. *Kenin*, 234 F.Supp. 429, 442 (S.D.N.Y. 1964), which stated:

> "The legislative history of the Section would appear to also be in accord with defendants' position that the Section relates solely to questions of financial dealings. Thus during the course of debate, Senators McClellan and Ervin made it quite clear that the Section would relate solely to matters of money and property. See II Leg. History 1129-31 (1959)."

This debate concerned the fiduciary provision included as § 501 of S. 1555, the Kennedy-Ervin Bill.

Our court in *Johnson* v. *Nelson*, 325 F.2d at 650, made a careful analysis of Title V of the Landrum-Griffin Act and concluded the explicit language of § 501(a) imposed a broad fiduciary obligation on union officers and representatives and approved the thorough and detailed analysis of the legislative history contained in the district court opinion in *Nelson* v. *Johnson*, 212 F.Supp. 233, 284-96 (D.Minn. 1963). Judge Larson's analysis should be read for an in-depth understanding of the history of the Act. However, for the purpose of this opinion it will suffice to follow the Act from its introduction in the Senate to its ultimate passage.[1]

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[1] The legislative history of the Labor-Management Reporting and Disclosure Act of 1959 has been compiled by the National Labor Relations Board and published as a two volume set entitled *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*. Citations relevant to legislative background will be to this set.

The original bill in the series was S. 1555 (the Kennedy-Ervin Bill). It was passed by the Senate containing a very narrow fiduciary provision, specifically pertaining to the handling of money and property of the labor organization by its officials. After passage by the Senate the bill was sent on April 25, 1959, to the House and referred to the Committee on Education and Labor.

Four separate bills were introduced in the House. (1) H.R. 7265 (the Kearns Bill) on May 20, (2) H.R. 3342 (the Elliot Bill) on July 23, (3) H.R. 8400 and H.R. 8401 (Identical bills introduced concurrently and known as the Landrum-Griffin Bill) on July 24 and (4) H.R. 8490 (the Skelly Bill) on August 3. These were all referred to the Committee on Education and Labor. The significant bills of this group were the Elliot Bill and the Landrum-Griffin Bill. The Elliot Bill contained a fiduciary provision as § 501 which was identical to the one in the present Act. The fiduciary provision in the Landrum-Griffin Bill was identical to the Elliot Bill. The Committee reported favorably the Elliot Bill on July 30. The Committee Report contained the following comments on § 501:

> "The committee bill also contains provisions dealing with breaches of trust and other questionable transactions, which, although not seriously criminal, nevertheless are incompatible with a strong and honestly run labor movement." I Leg. Hist. 768.

In the Supplementary Views by Representative Elliot and four other Members of the House it was stated:

> "Union officials occupy positions of trust. They hold property of the union and manage its affairs on behalf of the members. It is the duty of union officers just as it is the duty of all similar trustees to put their obligations to the union and its members ahead of any personal interest.

"The committee bill sets forth this principle unequivocally and declares that union officers and agents occupy positions of trust in relationship to labor organizations and their members. It then sets forth their duties in terms which the common law applies to all persons who undertake to act on behalf of others:

> "'* * * to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted hereunder, to refrain from dealing with such organization as an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

"We affirm *that the committee bill is broader and stronger than the provision of S. 1555 which relate to fiduciary responsibilities.* S. 1555 applied the fiduciary principle to union officials only in their handling of 'money or other property' (See S. 1555, sec. 610), apparently leaving other questions to the common law of the several States. Although the common law covers the matter, we considered it important to write *the fiduciary principle explicitly into Federal Labor legislation. Accordingly the committee bill extends the fiduciary principle to all the activities of union officials and other union agents or representatives.*" I. Leg. Hist. 839 (emphasis added).

The additional Statement by Hon. Phil M. Landrum and Hon. Robert P. Griffin opposed the Elliot Bill in favor of

their own substitute, the Landrum-Griffin Bill. But, of this substitute they said:

> "In general, the substitute is framed on the bill reported by the committee; we have retained the committee's technical amendments and many other features of the committee bill which make a contribution to an effective labor reform measure. There are no 'strangers' in our substitute bill; every provision was thoroughly considered by the full committee." I Leg. Hist. 857.

On the floor of the House during debate, Representative Griffin made this statement concerning his bill:

> "For a moment, I believe attention should be focused upon the similarities between the committee bill and the substitute, H.R. 8400. For example, in both bills, * * * title V—covering the fiduciary responsibility of union officers, bonding, loans, restrictions against the Communists and exconvicts holding office—[is] identical without a word or a common changed." II Leg. Hist. 1566.

As previously stated the Committee reported the Elliot Bill favorably. When the committee approved Bill was considered by the House it was amended by substituting the Landrum-Griffin Bill *in toto* for the provisions of the committee approved Elliot Bill, II Leg. Hist. 1691. S. 1555 was then amended by substituting the Landrum-Griffin provisions (now number H.R. 8342 however) for its provisions. II Leg. Hist. 1701. S. 1555, as thereby amended, was then passed by the House. II Leg. Hist. 1702. It went to a conference where § 501 survived unchanged and ultimately became § 501 of the Labor-Management Reporting and Disclosure Act of 1959.

From this outline it can be seen that consideration of the remarks of Senators McClellan and Ervin in regard to § 501 of S. 1555 would tell us nothing about the legislative

history of § 501 as finally passed without further reference to the legislative history of the Elliot Bill which was incorporated in the Landrum-Griffin Bill and which became the law. The quoted material shows that the Elliot Bill strongly favored the broad scope application of the fiduciary provisions of § 501(a) and not the narrow provisions referred to in the remarks of Senators McClellan and Ervin.

Based on the history outlined above it appears clear that *Gurton* v. *Arons*, based as it was on the legislative history of the Kennedy-Ervin Bill which was amended out of existence, was unduly restrictive of the scope of the fiduciary duties of union officials commanded by § 501, and that *Johnson* v. *Nelson*, basing its decision on the legislative history of the Elliot Bill, was properly decided.

The Third Circuit has recently adopted the broad scope interpretation of § 501. The United States District Court for the Western District of Pennsylvania had dismissed an action brought under § 501 on the ground that the remedy was available only in actions dealing with money or property of a labor organization, citing *Gurton* and its progeny. *Antal* v. *Budzanoski*, 320 F.Supp. 161, 164 (W.D.Pa. 1970). On appeal the court first found that the complaint did state a cause of action dealing with the holding and expenditure of union funds and further, citing with approval *Johnson* v. *Nelson*, the court disagreed with the district court's "reading" of § 501. *Sabolsky* v. *Budzanoski*, 457 F.2d 1245, 1250-51 (3d Cir.), *cert. denied*, 409 U.S. 853 (1972).

The District of Columbia Circuit has recognized that it, at least impliedly, has adopted the broad scope view of § 501, *Cefalo* v. *Moffit*, 449 F.2d 1193, 1198 n.15 (D.C.Cir. 1971), "[by] approving payment of counsel fees [in *Bakery & Confectionary Workers Int. Union* v. *Ratner*, 335 F.2d 691 (D.C.Cir. 1954)] to an attorney who had successfully represented union members in a § 501 suit which sought relief for violations not involving property rights."

Appellants have not advanced any substantial arguments which would cause us to change our position with regard to the scope of § 501(a) and we decline to do so. In fact our re-examination of *Nelson* v. *Johnson* convinces us that the broader view of fiduciaries' responsibilities is correct, based on Congressional intent and the explicit language of § 501 (a).

Appellants raise a second issue with regard to § 501. They argue that it gives jurisdiction for suits only for relief for the benefit of the labor organization.[8] Appellants allege that this action falls outside the statute as it seeks relief for the individual members rather than relief for the benefit of the labor organization.

This position was adopted by the Ninth Circuit in *Phillips* v. *Osborne*, 403 F.2d 826, 832 (9th Cir. 1968). In *Phillips* the officers of Local 580, International Brotherhood of Pulp, Sulphite & Paper Mill Workers, AFL-CIO, fearing that the members of the local would soon disaffiliate the local from the International Brotherhood and associate with the Western Pulp & Paper Workers, a newly formed, rival labor organization, placed the assets of the local in an escrow account under the control of the International Brotherhood and beyond the reach of the local union. The next day the members sought to have the assets returned to the local but the officers refused. The membership then voted to disaffiliate and join the Western group. Plaintiff Phillips was the president under the new organization. Defendants were the former officers of the local who had transferred the assets. The relief requested was a pro rata distribution of

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[8] Section 501(b) reads in pertinent part:

"When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section * * * [a] member may sue such officer * * * to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization.

the transferred assets to the members of Local 580 at the time of the disaffiliation. The court held that such relief was "not for the benefit of the labor organization."

We need not decide whether *Phillips* was correctly decided as the instant case is easily distinguishable as to the relief requested of the court. The restoration of orderly democratic processes to the local union is clearly a benefit to the labor organization, and a proper subject of concern to the entire membership. *Bakery & Confectionary Workers Int. Union* v. *Ratner*, 335 F.2d 691, 696 (3d Cir. 1964); *Retail Clerks Union Local 648* v. *Retail Clerks Int. Ass'n.*, 299 F.Supp. 1012, 1022 (D.C.C.C. 1969). In *Johnson* v. *Nelson* the relief sought was a payment of fees owing to attorneys but the enforcement of such relief, as the enforcement of the mandate issued by the membership to its officers and disregarded in violation of their fiduciary duties, was clearly of benefit to the membership. Here the correction of the past violations of the rights of the members and the breaches of the fiduciary obligations by both the local and International officers will be a benefit to the local even though the relief must necessarily include the restoration of the funds withheld as a result of the defendants' wrongful acts.

The final point raised by appellants, that some members of Local No. 3 might have a vested right in the pension fund which cannot be destroyed since they are not parties to the suit, is without merit. Appellants have not shown that any such person exists although they were in a position to do so if they wished. Further, this objection cannot be used to thwart correction of past abuses of trust. If such a situation does arise, the defendants *conceivably* are responsible therefor; however, the legal effects of a vested interest situation, if any, must await future resolution.

Judgment affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1411. September Term, 1972

ANTHONY G. PIGNOTTI, as an individual member of Local # 3 Sheet Metal Workers International Association, *Appellee,*

vs.

LOCAL #3 SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *Appellants;*

SHEET METAL WORKERS NATIONAL PENSION FUND; LESTER FORMAN; WALTER BRADER; EDWARD J. CARLOUGH; DAVID TODD, *Appellants;*

OMAHA-COUNCIL BLUFFS SHEET METAL CONTRACTORS ASSOCIATION.

APPEAL FROM the United States District Court for the _____ District of Nebraska.

THIS CAUSE came on to be heard on the record from the United States District Court for the _____ District of Nebraska and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 20, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-493

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; EDWARD J. CARLOUGH; and DAVID TODD,

Petitioners,

v.

ANTHONY G. PIGNOTTI, as an individual member of Local #3 Sheet Metal Workers' International Association,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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PRIESMAN GRAPHICS — OMAHA, NEBRASKA

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impressing a trusteeship upon the local and having the trustee refuse to implement the lawful mandate of the vote. 21

V. — There is no provision in the National Labor Relations Act or any other federal labor legislation which prevents a local union member from bringing suit under Section 102 of 501(b) of the Labor-Management Reporting and Disclosure Act to obtain relief against the local and international union officials in respect to activity undertaken by them which is essentially unconcerned with their capacity as collective bargaining representatives but which activity peripherally involves their capacity as collective bargaining representatives. 23

VI. — Federal Courts in evaluating the validity of the conduct of local and international union officials, may make interpretations of the union's constitution, rules of parliamentary procedure, written and unwritten customs or practices where the evidence indicates that the rules and applications thereof are used by the aforesaid officials to deprive the union members rights guaranteed by the Labor-Management Reporting and Disclosure Act. 25

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-493

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; EDWARD J. CARLOUGH; and DAVID TODD,

Petitioners,

v.

ANTHONY G. PIGNOTTI, as an individual member of Local #3 Sheet Metal Workers' International Association,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are properly described, cited, and set forth in the Petition and its appendices.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is the scope of the fiduciary obligation imposed on union officials by Section 501(b) of the Labor-Management Reporting and Disclosure Act broad enough to cover not only an official's duties relative to union funds, but also other pecuniary and non-pecuniary aspects of his trust?

2. May a union member bring suit under Section 501(b) of the Labor-Management Reporting and Disclosure Act to restore the integrity of the democratic process within the union and to recover allegedly unlawfully deducted pension premiums taken from the paychecks of all local members?

3. Under either Section 101(a)(1) or 501(a) of the Labor-Management Reporting and Disclosure Act, may an international union avoid the mandate of a lawful local union election on an issue of grave importance within the local by the expedient of impressing a trusteeship upon the local and having the trustee refuse to implement the lawful mandate of the vote?

4. Whether any provision of the National Labor Relations Act of or any other federal labor legislation prevents a local union member from bringing suit under Sections 102 or 501(b) of the Labor-Management Reporting and Disclosure Act to obtain relief against local and international union officials in respect to activity undertaken by them which is essentially unconcerned with their capacity as collective bargaining representatives but

which activity peripherally involves their capacity as collective bargaining representatives?

5. Whether in a suit brought under Sections 102 and 501(b) of the Labor-Management Reporting and Disclosure Act, a federal court, in evaluating the validity of the conduct of local and international union officials, may make interpretations of the union's constitution, rules of parliamentary procedure, and written or unwritten customs or practices where the evidence indicates that the rules and the applications thereof are used by the aforesaid officials to deprive union members of rights guaranteed by the Labor-Management Reporting and Disclosure Act?

STATEMENT

The Respondent does not agree with the Statement provided by the Petitioners in their Petition for a writ of certiorari. Although they stick to the basic chronological incidences which occurred during this long Pension Plan fight, the Petitioners give an undeserved tone of innocence to their narrative and mask the continuing ulterior motive behind all the continuing acts of the Union officials involved, and which motive the Courts below found abhorrent. That ulterior motive was, of course, to enforce pension participation upon Local #3 regardless of whether or not the majority of the members wanted it.

Therefore, a short narrative of the Pension Plan controversy, with emphasis upon the illegal motivation and design of the Petitioners and other defendants as found by the District Court and approved upon a careful review of the record by the Court of Appeals, is in order. The Petitioners here are just not allowed the luxury of contesting the facts as the District Court found them to be after four days of trial and the receipt of approximately 130 exhibits of a documentary nature. Additionally, the following is

not a detailed resume of the record, but merely a collection of some of the high points.

The District Court came to the conclusion from facts set forth in its statement of findings of fact that the Petitioners and other defendants not involved in this petition, "early in 1971 set out to obtain participation of Local #3 in the national plan, whether the majority of the union wanted the plan or not." *Pignotti v. Local #3,* 343 F. Supp. 236, 242.

The natural inclination of the Petitioners and other defendants to want to see Local #3 adopt the National Plan is undeniable, and as a matter of fact, the Petitioners frankly state such an inclination in their Petition. The problem comes in assessing the tactics the Petitioners and other defendants used in seeing that the National Plan was adopted.

The Court noted that on March 25, 1971, a motion to accept the National Plan was defeated. As a natural consequence thereof, the members may well have wanted to conclusively determine the fate of other plans, so the more general question, "Does the local want any plan?" was presented to the May 6 meeting. At that meeting the membership defeated the idea of participation in any plan. *Pignotti, supra,* 343 F. Supp. 236, 238-9.

President Brader, whom the District Court found was an active proponent of the Plan and bent on seeing that the National Plan was adopted with or without the consent of the majority, had in his possession at this May 6 meeting a petition for yet another special meeting to reconsider the adoption of the National Plan (*Pignotti, supra,* 343 F. Supp. 236, 238-9). In view of this, he must have been a bit alarmed when James Pignotti

made the motion to indefinitely postpone the pension plan and reference thereto.

Indicative of the quality of available evidence upon which the District Court could have drawn its conclusion that the Petitioners and other defendants herein were out to install the Plan with or without the consent of the members can be found in Tony Pignotti's description of how Brader handled the motion to indefinitely postpone the consideration of the Pension Plan offered by Jim Pignotti. Pignotti made the motion, and Brader called for a vote. From Tony Pignotti's testimony at trial:

"Q. Did you observe what the membership did when he called for a show of hands of those who were in favor of Jim's motion?

"A. Yes, I did, there was loads of hands.

"Q. Okay, did Mr. Brader then call for a show of hands on the people opposed?

"A. Yes, sir.

"Q. What did you observe when Mr. Brader called for a show of hands relative to those against Jim's motion?

"A. Not very many hands.

"Q. Then what transpired?

"A. Then President Brader said that the motion lost. And at that time Dennis Carlson got up and we all looked at each other, 'What the hell's going on?' All these hands that was up and then we lost the motion. Denny got up and he asked the chair for the vote, he wanted to know what the outcome was, how much did we lose by, and

the motion was 29 to knock it down, you know, and 24 for the motion.

"Q. Then what happened after that, now, was that Brader announced it was 29 to 24 vote?

"A. Yes, it was. It seems to me like at the time he announced it — I mean he didn't announce it right (snapped fingers), it was like a couple of seconds and then it was announced and at that time I thought it was Denny Carlson that made the motion that we have a division of the house because, well, we felt that it wasn't a true vote, and he asked for a division of the house, and at that time there was no hesitation at that time either, I mean, I mean that the people were for the motion got up and went to one side and the people that were against it went to the other side and the people that was against the motion gained one more vote and we had 60, I think that was 60 to 30."

(Appendix to Brief of Respondent in Opposition, pp. 1,2.)

The next episode in the pattern of trying to force the Plan upon Local #3 is handled this way by the District Court in its finding of facts:

"In the meantime, Brader frantically sought help from Carlough and received via Lonnie Gaither, assistant to Carlough, the bald conclusion that the motion to divide the house during the May 6, 1971, meeting was out of order. Before the vote could be forced at the May 27, 1971, meeting, a point of order was made that the meeting itself was out of order, since it had been called specially to vote on the pension question and Rule 30 of the Constitution and Ritual controlled. Rule 30 provides that 'When a question has been decided, it can be reconsidered only at the same meeting or on the next regular meeting night.' This not being a regular

meeting, the question could not be reconsidered. Brader overruled the point of order. The ruling of Brader was challenged by the membership, and the challenge was sustained upon vote of the members.

"Brader was undaunted by this third defeat of the pension plan within as many months and again besought Carlough to personally intervene, which Carlough did by using his power as general president to call yet another meeting, this time for June 21, 1971, to vote again on the national plan."

Pignotti, supra, 343 F. Supp. 236, 239.

This call for the vote which was ultimately successful deserves a little bit of analysis. The April 6 meeting had already arguably settled the question that the Local did not want the International Plan. One would think that the resurrection of *that* plan would be unfair in and of itself. Moreover, the May 6 meeting indicated that no plan was wanted and the motion to indefinitely postpone gave a further indication of the sentiment of the Union to end the discussion of pension plans.

The May 27 meeting was properly ruled out of order because of Rule 30 and May 27 not being the next regular meeting night after May 6. Additionally, the June 21 meeting called by Petitioner Carlough was in obvious violation of Rule 30 in that it was even farther removed from being the "next regular meeting night." The District Court, in hearing the entire body of evidence from the beginning of the controversy in early 1971 to its conclusion with the trusteeship in early 1972, found very clearly what was going on at this time. One would have to be naive not to believe what the Court found; that is, that the Petitioners and other defendants were going to get that Plan through no matter what.

On June 23, 1971, Defendant Forman refused to take two petitions for a reconsideration, one insufficiently worded. Also, about this time Business Agent Forman visited Tony Pignotti at his job site and told Pignotti to keep his mouth shut, that the International could fine him if it chose. *Pignotti, supra,* 343 F. Supp. 236, 240.

On July 15, 1971, the Local President Brader was presented with a petition to reconsider the participation which was to begin August 1. Brader accepted it but said it was too late. The Plaintiff Pignotti and others tried on succeeding nights to get Brader to honor the petition, but it proved fruitless. On July 26, 1971, Jim Pignotti and 113 other members filed suit in Federal District Court to enjoin the commencement of deductions and to require Brader to honor the petition for another vote. The suit failed to state a cause of action. (It was not a Labor-Management Reporting and Disclosure Act suit.) It should be noted that the Petitioners and defendants vigorously defended against the suit, the prayer of which was to hold another vote.

The Petition states that after the first suit Brader voluntarily decided to hold another vote. The District Court does not describe Brader's actions as voluntary. The record made it clear that the inclination of the Local officers was not to honor the request for another meeting (Appendix, pp. 2, 3, 4). The District Court could well have found from various other items of evidence in the record that Brader finally came to honor the petition when hounded into doing so by numerous supplications by Jim Pignotti, Tony Pignotti, and others.

At a singularly large turn-out October 22, 1971, the Local turned down the National Plan 175-119. The District Court

found that the Local union officers thereafter did not take sincere action to try to end the Plan. There is a little sideline in the case at this point which showed the mentality of the pro-Plan Local officers at this time. Jim Pignotti had told a local newsman the results of the October 22, 1971, vote. The executive board, on which Brader and Forman served, filed charges against James Pignotti claiming that he "engaged in conduct which is detrimental to the best interest of the association or any subordinate unit thereof or which will bring said union into disrepute." *Pignotti, supra,* 343 F. Supp. 236, 240, 241. Such a little item couldn't help but make the District Court feel that the Petitioners were not above coercion tactics to intimidate the anti-Plan members.

The Court found that the undersigned attorney wrote to Petitioner Carlough on November 30, 1971, saying that suit would be filed but would be stayed if the necessary acts to terminate the Plan were completed by December 15, 1971. On December 1, 1971, the Executive Board of the Contractor's Association met and requested that the Union make its request to delete the Plan in writing, that the contractors be released from liability, and that the Pension Plan would not be reinstated during the life of the contract which was to end approximately six months later. At this point the Local officers went to their local attorney and asked his opinion of the requirements. He wrote an opinion letter (Appendix B to Petition, p. 9) which stated that there were possible problems in ending the Plan from third-party beneficiaries earning vested rights in the Plan. In spite of the fact that the Local officers knew or easily could determine that no third-party beneficiaries could possibly be in existence at that time because 1200 hours of participation in the Plan were required before any rights vested, the Local officers probably planned to use that obviously faultily reasoned letter as an excuse to continue the Plan.

By this time, things were in the mill that made the Weinberg letter superfluous anyway. President Carlough had appointed David Todd to take over as trustee, which he did. The Petitioners at this point in time now try and cast Todd's decision to continue participation in the Plan as merely a routine, independently-arrived-at decision. The record doesn't support it, and the Court didn't find it. As a matter of fact, the Court did find that at Todd's first meeting, the reading of the Weinberg letter appearing in the Appendix to the Petition and the reading of the letter by the undersigned attorney dealing with the fact that there was no third-party beneficiary problem because 1200 hours had not been worked yet by any member of the Union, led to a lengthy discussion of the Plan on how the October 22, 1971 vote could be implemented. The Court found that Todd had stated at the meeting that he was willing to let the members do anything they wanted to do about the Plan, but during the discussion, a motion was made that the Local attorney and the undersigned attorney would get together at Union expense to implement the October 22, 1971 vote. Todd said that the Plan was going to be left alone, negotiated into the new contract, and the members would not be allowed to vote to ratify the contract. *Pignotti, supra,* 343 F. Supp. 236, 241. Thus, it just is absolutely not fact, nor was there anything in the record that indicated that Todd made his decision as to continuation of the Plan as just merely an incident of his job as trustee. The record totally supports the District Court's conclusion:

> "The Court is convinced that the purpose of the trusteeship was to prevent any further action of the members towards implementation of the vote to discontinue the Plan." *Pignotti v. Local #3,* 343 F. Supp. 236, 243.

In conclusion, the real error that should be pointed out in the Statement offered by the Petitioners in their Petition for Writ of Certiorari is that the Petitioners' narrative totally avoids the real crux of this lawsuit and the real evil that the District Court was striking out at in its decision. The Petitioners herein and the defendants who did not join in this Petition were not merely embarked upon a series of individually isolated, independent decisions and incidences which fortuitously resulted in the Plan being implemented and retained. The District Court found an ill and evil motive and pattern to deprive the members of Section 101 and Section 501 rights. The Court found that Union officials, whether motivated by arrogance, insensitivity, institutional inertia, the good of the members or whatever, determined that Local #3 was going to adopt the National Pension Plan, and then they proceeded to make self-serving interpretations of their own rules, ignore other rules, and cause implementation of the Plan over the clearly expressed dissent of the majority.

Recognizing that all this is what the District Court found upon four days of trial and about 130 exhibits, the Questions Presented recited in the Petition become quite simple to answer.

REASONS FOR NOT GRANTING THE WRIT

I.

The decision of the District Court as affirmed by the Eighth Circuit, when limited to its strictly section 101(a)(1) grounds, is totally dispositive of the controversy herein; therefore, in granting this writ on section 501(a) grounds, the Supreme Court would be merely entertaining a moot question insofar as the disposition of this law suit is concerned.

The District Court handled this controversy by giving

certain relief premised on both Section 101 and Section 501 grounds.

> "Here, the Court, in accordance with the principles of the foregoing decisions, will grant the following relief for the proven violations of 411 and 501 [Section 101 and Section 501] by the defendants . . ." *Pignotti, supra,* 343 F. Supp. 236, 244.

That reasoning for the relief was not disturbed by the Eighth Circuit other than to the extent that all the parties to this lawsuit agree that Section 501(b) provides no basis for granting relief against the labor organizations, the International and the Local:

> "Initially all parties agree that neither the International Association or Local #3 have violated Section 501 as that section imposes liability only on the individual union officials." *Pignotti v. Local #3,* 477 F.2d 825, 832 (CA8, 1973)

Thus, Section 101(a)(1) forms the adequate basis for the Respondent's total relief in all its aspects as awarded by the District Court.

The Petition for a Writ of Certiorari makes no strong showing that both the District Court and the Court of Appeals did not make a totally accurate assessment of the Section 101(a)(1) aspects of this particular case.

Given the facts as the District Court found them, i.e., the Petitioners and other defendants set out to cause participation in the National Plan with or without consent of the majority of the union, a clear, uncontroverted violation of Section 101(a)(1) was found.

Section 101(a)(1) reads:

> "Every member of a labor organization shall have equal rights and privileges within such organization . . . to vote in elections or referendums of the labor organization, to attend membership meetings, and *to participate in the deliberations and voting upon the business of such meetings,* subject to reasonable rules and regulations in such organization's constitution and by-laws." (Emphasis supplied.)

Certainly it cannot be argued that Section 101(a) is not violated when union officials contrive a scheme to force an important decision on the union against the will of the majority and use the rules and regulations of the organization merely to subvert efforts of their antagonists to upset the illegal scheme.

Accepting the facts as found by the District Court, then it is abundantly clear that the Eighth Circuit's handling of the Section 101 issue was totally accurate and consistent with the only logically available interpretation of Section 101(a)(1):

> "Appellants cite *Vestal v. Hoffa,* 451 F.2d 706, 709 (6th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972) for the proposition that the union officials and not the courts are the proper parties to interpret the union's constitution. We agree generally with this proposition of law, provided, as recognized in *Vestal,* that the interpretations are fair and reasonable. But we also recognize, as did the Court in *Sabolsky v. Budzanoski,* 457 F.2d 1245 (3d Cir.), *cert. denied,* 409 U.S. 853 (1972) that 'Courts have not hesitated to strike down so-called 'authorized' union conduct alleged to be based on a rule or by-laws fairly interpreted, where such conduct violates the provisions of the Landrum-Griffin Act.' . . . In our own case of *Johnson v. Nelson* . . . we cut past the question of whether the interpretation of the by-laws and constitution of a union was 'authorized' to determine whether the conduct of the union officials, in refusing to act

according to the majority vote of the membership, constituted a violation of their Section 501 fiduciary duties. *The Act does not permit the violation of rights guaranteed to union members under Section [101] upon a showing that the violation was in accord with the union's constitution and by-laws." Pignotti, supra,* 477 F.2d 825, 831. (Emphasis supplied.)

Other portions of this argument will make it even clearer that the Courts below were absolutely correct in their handling of the 101 aspect of this case and that the Petitioners are really only quibbling with the District Court's factual finding of a design by the Petitioners and other defendants to force the Plan on the membership regardless of majority dissent thereto.

For the Supreme Court to grant this Writ would cause it to merely entertain the 501 issue here, and operating on 501 alone, the Supreme Court could do nothing to disturb the disposition of the entire controversy as it was arrived at by the District Court below and approved by the Eighth Circuit. No aspect of the District Court's relief would be altered by an adverse 501(b) decision at this level. That would mean that the Supreme Court would be entertaining the suit merely for the purposes of solving a moot question and not for adjusting any rights or making any change in the disposition of the controversy. Because the 101 aspects of the case were properly handled and disposed of all aspects of the controversy, hearing this matter would merely have the Court handle this case for its 501 academic value.

II

The scope of the fiduciary obligation imposed on union officials by section 501(b) of the Labor-Management Reporting and Disclosure Act covers not only an official's duties relative to union funds and property but also covers other pecuniary and non-pecuniary aspects of such officials' trust.

The first question presented by the Petitioners is very likely the only serious point in their favor in trying to obtain a Writ of Certiorari. In their first "Question Presented," they suggest that the proper interpretation of the Labor-Management Reporting and Disclosure Act, particularly 501(b) thereof, requires that a very narrow view of the fiduciary duty of a union official was contemplated by Congress in passing the Act. For years, the Second Circuit has been committed to this narrow interpretation that would have a union official's fiduciary obligations under 501 be limited strictly to an official's handling of the union property or funds. The other side of this issue is the position of the Eighth Circuit, which holds that Section 501(b) contemplates a fiduciary obligation that extends well beyond the handling of the money and property of the union, but covers both pecuniary and non-pecuniary aspects of a union official's trust to his members.

The above conflict is not of recent vintage. The Eighth Circuit first enunciated the principle that the fiduciary duty is broad in scope in 1963 in *Johnson v. Nelson*, 325 F. 2d 646. The following year the Second Circuit arrived at the narrow scope position in *Gurton v. Arons*, 339 F. 2d 371.

Federal labor law has survived this nine-year dichotomy without need to resolve it in the Supreme Court. It may well be that after the Third Circuit decided *Sabolsky v. Budzanoski*, 457 F.2d 1245 (C.A. 3, 1972) that the Supreme Court had an

opportunity to consider whether or not the conflict between the broad scope versus narrow scope interpretation should be resolved. This writer is without the research capability to determine the fact of the matter. However, the United States Supreme Court may have been invited at that time to resolve the conflict and decided not to, as certiorari was denied October 10, 1972, at 34 L.Ed.2d 96. It would be appreciated if the reader reviewing this brief would determine if the Court has at least that time passed up the opportunity to speak out on the conflict.

The best reason why a Writ isn't required to straighten out the inconsistency between the Second Circuit and the Eighth and Third Circuits is because any confusion that may have resulted is being resolved on its own. Contrary to the position of the Petitioners who claim that *Sabolsky* stood for the broad interpretation only in dicta, the Third Circuit was clearly not indulging in dicta but ruling on the merits of the issue and reversing the district court on its broad versus narrow stand:

> "The district court found that the complaint does not contain allegations of failure to hold money or property for the benefit of the organization nor of any expenditure not authorized by the constitution, by-laws or resolutions, and that Section 501(b) remedies are only available as a cause of action dealing with the fiduciary responsibility with respect to the money or property of the union. We read the complaint as setting forth allegations regarding the holding and expenditure of union funds. *Moreover, we disagree with the court's reading of the scope of Section 501." Sabolsky v. Budzanoski,* 457 F.2d 1245 at 1250. (Emphasis supplied.)

Then the Third Circuit goes on to cite the history of the Act and points out the historical error of the Second Circuit's *Gurton* decision:

"A complete study of that history reveals that Senate Bill 1555 was amended by H.R. 8342 and as finally enacted, extends the fiduciary principle to all of the activities of union officials and other union agents or representatives . . . and that Section 501 attempts to define in the broadest terms possible the duty which the new federal law imposes upon a union official." (457 F.2d 1245 at 1250).

The Eighth Circuit in the instant case very carefully traced the legislative history of 501(b) and isolated and identified in precise, unequivocal language the glaring error of the *Gurton* decision's legislative history and then commented:

"From this outline it can be seen that the consideration of the remarks of Senators McClellan and Irvin in regard to Section 501 of S.1555 would tell us nothing about the legislative history of Section 501 as finally passed. Without further reference to the legislative history of the Elliot bill which was incorporated in the Landrum-Griffin Bill and became the Law, the quoted material shows that the Elliot bill strongly favored the broad scope application of the fiduciary provisions of 501(a) and not the narrow provisions referred to in the remarks of Senators McClellan and Irvin.

"Based on the history outlined above, it appears clear that *Gurton v. Arons, based as it was on the legislative history of the Kennedy-Irvin bill which was amended out of existence, was unduly restrictive of the scope of the fiduciary duties of union officials commanded by Section 501* and that *Johnson v. Nelson,* basing its decision on the legislative history of the Elliot bill, was properly decided." *Pignotti v. Local #3,* 447 F.2d 825, 834. (Emphasis supplied.)

It is suggested that now the clear error of *Gurton* has been pointed out by *Sabolsky* and *Pignotti* that it is only a matter of time and the opportunity to litigate the issue in other cases until

Gurton with its poor reasoning suffers a natural death and receives a decent burial.

If the Court is not inclined to let *Gurton* die a natural death, there is an equitable consideration that requries that this case is not the occasion to decide one way or the other. The Supreme Court, on some other occasion, will be invited to resolve this issue. [The Petitioners cited *Morrissey v. Curren,* — F.2d —, 83 L.R.R.M. 2950 (C.A.2, June 18, 1973). It may well be that that particular case now sits on a petition for a writ of certiorari raising this conflict of broad versus narrow scope.] There may be others right now before the Court. There certainly will be some in the next few years.

If the Court is not disposed to let *Gurton* die a natural death, then it should wait for a more appropriate case. In this case right today Tony Pignotti and over 500 other members are contributing 20 cents an hour from their own wages for every hour worked, as they have continued to do ever since this Plan was unlawfully impressed upon them in the summer of 1971. They are waiting to get their money back. Most of the money is in a special fund, and an end to this appeal will start the process of returning the money quickly.

The members of Local #3 obviously and understandably want their money back. They don't want to wait another year on a decision from the Supreme Court. In view of what was said in the immediately preceding portion of this particular brief, namely, that the 101 aspect of the Petitioners' case is so weak, that the 501 aspect becomes moot, there is no reason in fairness why the Supreme Court shouldn't wait for the next case if it really feels *Gurton* has to be executed as opposed to dying a natural death.

The opportunity will shortly come again when the issue isn't moot. There is no reason for 500 hard-working union members to sit by and continue to contribute and have their refund delayed that much longer, while lawyers and judges thrash out a totally academic question on 501, a decision either way on which would not affect the District Court's relief in the slightest, adequately based as it was on 101.

III.

A union member may bring suit under section 501(b) of the Labor-Management Reporting and Disclosure Act to restore integrity of the democratic process within the union and to recover allegedly unlawfully deducted pension premiums taken from the pay checks of local members.

The Petitioners argue that the monetary relief sought and obtained by the Respondent was for the benefit of only himself and certain other Union members. The first thing that should be noted is that the order of the District Court will return all of the money to all of the members of the Union from whom deductions are taken.

At one point in its Petition, the Petitioners point out that Local #3 is divided into two parts: production workers and construction workers. As a practical matter, the record established that the two divisions are in practice very well isolated and separated. The Pension Plan applied only to the construction members, and the deductions come from the wages of every member of the construction division. The votes and meetings discussed heretofore all involved only meetings of the construction group. The groups do not have joint meetings. Each one of those men, if the District Court's relief is put into effect, will recover his money; so the relief is in effect union-wide in

relationship to the pension controversy and the people caught up in that controversy.

The argument can be made that a return of wrongfully taken money to each member of the union does "benefit the organization" as that language is used in Section 501(b) where "Suit is permitted in any district court . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the organization . . ." It is logical to argue that if all of the members of a union are restored to them monies wrongfully taken, that yields a direct benefit to the labor organization as a whole, especially in terms of the espirit d'corps amongst the men for the organization.

The *Phillips v. Osborn*, 403 F.2d 826, reasoning unduly restricts the meaning of "To recover damages or secure an accounting or other appropriate relief for the benefit of the organization." The restriction is a natural consequence of that Court's adopting (for *Phillips* only) the narrow view of 501 which we have heretofore demonstrated is in error. If one accepts that the fiduciary duty of a union official transcends merely his duty over the money and property of the union, then it is obvious that the language, "Benefit of the labor organization" is likewise not restricted to benefits merely enhancing the coffers of the union.

The Eighth Circuit's handling of this problem is correct. That Court didn't bother to criticize the thinking of *Phillips*, merely distinguish it:

> "We need not decide whether *Phillips* was correctly decided as the instant case is easily distinguishable as to the relief requested of the court. The restoration of the orderly democratic processes to the local union is clearly a benefit to the labor organization and a proper subject of concern to the entire membership." *Pignotti v. Local #3*, 447 F.2d 825, 835.

IV.

An international union may not avoid the mandate of a lawful union election on an issue of grave importance within the local by the expedient of impressing a trusteeship upon the local and having the trustee refuse to implement the lawful mandate of the vote.

The Petitioners claim that the Court of Appeals held that a trustee is bound by and has an obligation to implement the purpose of the membership vote taken prior to the imposition of the trusteeship. The Petitioners further claim "This was a sheer fabrication on the part of the Courts below in an attempt to obligate Trustee David Todd to take specific affirmative action on a collective bargaining issue, on which he has discretion to act in various ways, provided only that he must exercise his authority to bring about a result that he believes to be in the best interests of the union." (Petition, p. 15)

The error of the Petitioners here is clear. They are acting as though the Court had come up with a finding that Trustee Todd was totally innocent and fairly motivated in his activity in refusing to implement the October 22, 1971 vote. However, the District Court found absolutely to the contrary. The Court stated that it was convinced that Todd's reason for being appointed trustee by Carlough was to seal the Union into the Plan. The evidence doesn't have to be repeated. The Petitioners have no right to pretend as though the Court didn't make that finding.

The Courts below have merely stated the obvious. The Courts below were not going to give international unions a tool in the Act's trusteeship provisions that could be effectively used by an international union to totally destroy all the protections of the other sections of the Act.

The Eighth Circuit pointed out that "29 U.S.C. 466 provides that the remedies provided by the subchapter of which it is a part which includes 29 U.S.C. 464, are not exclusive. Thus the right to sue under 29 U.S.C. 412 is not affected by the right to attack trusteeships under 29 U.S.C. 464." *Pignotti* at 477 F.2d 831. Most assuredly the trusteeship provisions of the Act are not the premier aspects of Landrum-Griffin to which all other provisions are subordinate.

What the Petitioners urge here is that the Supreme Court create a monster that could destroy the entire fabric of the Labor-Management Reporting and Disclosure Act:

> "The Congressional impositions of fiduciary obligations upon agents and officers of unions would be meaningless if all of these duties could be abrogated by the mere device of imposing a trusteeship. Past wrongs call for a remedy, not technical objections." *Pignotti v. Local #3*, 477 F.2d 825, 832.

The District Court and the Court of Appeals found that serious 101 and 501 violations took place. The Petitioners invite the Supreme Court to create a technique whereby internationals can effectively instigate and perpetuate such violations. The invitation so tendered is easily rejected.

V.

There is no provision in the National Labor Relations Act or any other federal labor legislation which prevents a local union member from bringing suit under Section 102 or 501(b) of the Labor-Management Reporting and Disclosure Act to obtain relief against the local and international union officials in respect to activity undertaken by them which is essentially unconcerned with their capacity as collective bargaining representatives but which activity peripherally involves their capacity as collective bargaining representatives.

The Petitioners argue that because the Local officers were duly elected collective bargaining representatives, their activity in causing the Plan to be implemented and then causing it not to be dismantled were totally protected from the reach of the Labor-Management Reporting and Disclosure Act, because in doing those various acts they were merely carrying on activity as collective bargaining representatives.

Once again, the false premise upon which Petitioners proceed is that they are not living with the facts as found by the District Court and approved by the Eighth Circuit. The essence of their activity here did not concern their obligations as collective bargaining representatives. The essence of their activity as found by the Court was an illegal effort to force Local #3 to accept the National Plan no matter what. The Eighth Circuit dismissed this contention rather quickly:

> "Appellants collective bargaining argument is that participation or non-participation in the pension plan is a collective bargaining issue rather than an internal union issue and that only internal union issues are the proper concern of the Landrum-Griffin Act. This argument is not well taken. The action seeks to preserve the democratic

processes in Local #3, a proper subject of concern under the Landrum-Griffin Act. The issue raised is whether the method used by union officials to secure the Local's participation in the Plan violated Sections 411 and 501 of the Act." *Pignotti v. Local #3*, 477 F.2d 825, 831.

The Petitioners on this particular issue have said that, "The Court should rule on this point in the interest of harmonizing the variant labor policies under these two federal acts." (Petition, p. 17.) There is no need for the Court to so act in this case because it is clear that the Petitioners are proceeding on the false premise that the Courts below viewed their activity as essentially activity of collective bargaining agents and proceeded to rule as it did anyway. The truth of the matter is that the Courts below viewed the activity not as collective bargaining activity but as a broader scheme of activity aimed at unlawfully trying to impose the pension upon the Union, and in so doing petitioners and defendants committed acts which were sometimes connected with collective bargaining activities, sometimes connected only with their duties as moderators of meetings or record keepers, or whatever, but that all these various sub-activities fitted into an overall scheme of activity unlawful under the Labor-Management Reporting and Disclosure Act. Only a portion of that activity constituted collective bargaining representation (that portion being the most obnoxious to L.M.R.D.A. principles; to-wit: actually implementing into the contract and preserving there the lawlessly achieved participation in the pension).

VI.

Federal courts in evaluating the validity of the conduct of local and international union officials, may make interpretations of the union's constitution, rules of parliamentary procedure, written and unwritten customs or practices where the evidence indicates that the rules and applications thereof are used by the aforesaid officials to deprive the union members rights guaranteed by the Labor-Management Reporting and Disclosure Act.

The Petitioners, when one gets right down to the heart of their position, argue that the Union officials charged with wrongful conduct should themselves be the sole arbiter of whether or not they are fairly and reasonably interpreting their own rules and regulations. The Petitioners would have the General President of the International himself be the final say on whether or not the scheme or activity involved in forcing this Plan on Local #3 was a violation of Sections 101(a)(1) or Section 501(b). The very idea is fatuous.

The Petitioners cite *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971) as authority for the proposition that the courts are not entitled to interpret union rules and regulations. *Hardeman* doesn't stand for that position at all. *Hardeman* stands for the position that federal courts should evaluate union procedures to see that they do not violate any provisions of the Labor-Management Reporting and Disclosure Act. As a matter of fact, the Court specifically holds that in enacting Section 102, Congress clearly indicated a purpose to refer L.M.R.D.A. violations to the District Courts for their scrutiny:

> "Those factors suggesting that resort must be had to the administrative process are absent from the present case. *The*

> ***fairness of an internal union disciplinary proceeding is hardly a question beyond the 'conventional experience of judges,'*** **nor can it be said to raise issues within the 'special competence of the N.L.R.B.' . . . As we noted in that case, the 86th Congress which enacted 101(a)(5) was plainly of the view that the protections embodied therein were new material in the body of federal law . . .** ***And in Section 102 Congress has clearly indicated a purpose to refer claims regarding the violation of Section 101(a)(5)*** **[due process in union discipline] to the district courts."** ***Hardeman, supra,*** **401 U.S. 233, 238-9. (Emphasis supplied.)**

As opposed to the position that the federal courts must keep hands off of consideration of internal union rules, the mandate of Section 102 is clear that they should survey them. The only rule courts should observe is that unions should be autonomous and that reasonable, lawful, internal activity on the part of the unions and officers shouldn't be disturbed by courts.

This Court, in *Hardeman,* then proceeded to make an inquiry into whether or not the union, in applying its rules, regulations, and disciplinary processes, did or did not violate the requirements of the Labor-Management Reporting and Disclosure Act relative to due process in union discipline. The Court went on to specifically test whether or not Hardeman received adequate notice of the charges against him, adequate notice being a requirement of Section 101(a)(5)(a). The Supreme Court again tested whether or not there was *sufficient evidence to warrant the disciplinary finding against Hardeman and concluded that there was.* Thus *Hardeman* just does not stand for the proposition that union officials are to be the sole and final arbiters of whether or not they are applying their rules fairly or unfairly. Such a position is ludicrous because once again it would create within the very language of the Act the tool by which the

whole intent and purpose of the Act could be sabotaged by unscrupulous union officials.

Once again it is easy to find the source of the Plaintiffs' error. Their problem is that they refuse to be saddled with the facts as they were found, which is not a liberty they are allowed to take at this stage of the proceedings. The Eighth Circuit, on a review of the District Court record, found specifically that the Union officials had in fact unfairly handled the pension issue and used their own rules and regulations to perpetuate a denial of the democratic process within Local #3:

> "Appellates cite *Vestal v. Hoffa*, 451 F.2d 706, 709 (6th Circ., 1971) *cert. denied*, 406 U.S. 934 (1972) for the proposition that union officials and not the courts are the proper parties to interpret the union's constitution. We agree generally with this proposition of law, provided as recognized in *Vestal* that the interpretations are fair and reasonable." 477 F.2d 825, 831.

The Eighth Circuit then went on to point out that they did not feel that the Union's handling of its own regulations here was fair or reasonable and the effect of the application of said rules, though "authorized," was to cause substantial violations of 101 and 501(b). The Eighth Circuit took time to foot-note one very glaring of many glaring examples of unfair treatment of the members due to the Union officials' procedural decisions:

> "Nevertheless, it appears that the district court's finding that the plaintiff and the anti-pension group were unfairly treated by the union's procedural decisions is correct. An example of this is the union's position that the vote favorable to the plaintiff on the motion to postpone indefinitely was improper because the chair had already announced the vote. The primary purpose of the call for division of the house is to test the chair's announcement of the vote in situations such

as this where the chair's announcement is obviously incorrect." *Pignotti v. Local #3*, 477 F.2d 825, 831, footnote 6.

The District Court and the Eighth Circuit below were merely exercising the mandate of Section 102 that authorizes lawsuits in federal district courts where 101 and 501 violations are alleged to have occurred. The Court here showed the appropriate restraint and respected the tension that has developed over the years as to whether or not the courts should quickly meddle with internal union processes or lay back and correct only the most egregious. It is submitted that in this particular case the Courts below showed restraint and were merely correcting the most egregious of 101 and 501 violations.

CONCLUSION

For all of the reasons previously stated, it is respectfully urged that the Court deny the Petition for a Writ of Certiorari.

Respectfully Submitted:

EDWARD F. FOGARTY
700 Service Life Building
Omaha, Nebraska 68102
Attorney for the Respondent.

APPENDIX

Excerpts from Pages 84 and 85
of the
Transcript of Trial
Testimony
of
Anthony G. Pignotti

Q. Did you observe what the membership did when he called for a show of hands of those who were in favor of Jim's motion?

A. Yes, I did, there was loads of hands.

Q. Okay, did Mr. Brader then call for a show of hands on the people opposed?

A. Yes, sir.

Q. What did you observe when Mr. Brader called for a show of hands relative to those against Jim's motion?

A. Not very many hands.

Q. Then what transpired?

A. Then President Brader said that the motion lost. And at that time Dennis Carlson got up and we all looked at each other, "What the hell's going on?" All these hands that was up and then we lost the motion. Denny got up and he asked the chair for the vote, he wanted to know what the outcome was, how much did we lose by, and the vote was 29 to knock it down, you know, and 24 for the motion.

Q. Then what happened after that, now, was that Brader announced it was 29-24 vote?

A. Yes, it was. It seems to me like at the time he announced it — I mean he didn't announce it right (snapped fingers), it was like a couple of seconds and then it was announced and at that time I thought it was Denny Carlson that made the motion that we have a division of the house because, well, we felt that it wasn't a true vote, and he asked for a division of the house, and at that time there was no hestitation at that time either, I mean, I mean that the people that were for the motion got up and went to one side and the people that were against it went to the other side and the people that was against the motion gained one more vote and we had 60, I think, I think that was 60 to 30.

Plaintiff's Exhibit 66 from Transcript of Trial

Minutes of Executive Board Meeting
September 14, 1971

Special Executive Board Meeting September 14, 1971

President Brader opened the meeting at 7:30 P.M. Others present were Jim Merwald, Pete Kanger, Dewey Stewart, Bob Haty, Les Forman and myself.

Motion by Jim Merwald Second by Les Forman to follow the advice of attorney Weinburg not to honor the petition requesting another meeting to vote on reconsidering the pension plan. Carried, Merwald, Kanger, Haty, Forman and myself for. Brader and Stewart opposed.

Motion by Walt Brader Second by Jim Merwald to make an addition to the referal card, "I will go out of town or I will not go out of town." carried unanimous.

Motion by Dewey Stewart Second by myself to inform the police that our minute book is missing and presumed stolen: Carried. Forman opposed.

Motion by Les Forman Second by Dewey Stewart that he be reimbursed for rewriting the minutes from notes. carried

Motion by Dewey Stewart Second by Jim Merwald to adjourn

Carried 10:00 P.M.

Respectfully Submitted

Donovan H????
Recording Secretary

Plaintiff's Exhibit 67 from Transcript of Trial

23 September, 1971

Mr. Walter Brader
6010 Charles
Omaha, Nebraska

In Re: Pignotti, et al vs.
Local #3, et al

Dear Mr. Brader:

James Pignotti informs me that at a recent executive

council meeting of the Local the status of the above-captioned case now on file in the United States District Court for the district of Nebraska was discussed. He stated that the impression of several board members including yourself was that the case was going to be appealed to the Eighth Circuit Court of Appeals.

I write this letter as the attorney for Mr. Pignotti and several others. I have unequivocally advised them not to appeal the case to the Eighth Circuit. I have unequivocally let them know that such an appeal would be futile. They have unequivocally agreed with my decision. There will be no appeal to the United States Circuit Court of Appeals of the decision by Judge Denny.

Furthermore, I have told them that they will probably get their best results if they try and prevail upon the local leadership here to honor the petition. They have told me that you have at no time unequivocally refused to hold the election and have even indicated that you might be willing to honor their petition. They now seek at the local level the honoring of their lawful petition. Any refusal to honor that petition based in whole or in part upon the notion that the local should refrain from taking action because of the possible appeal is totally without merit. THIS CASE IS NOT BEING APPEALED.

Yours very truly,

Edward F. Fogarty

EFF:mgs